TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 178

WILLIAM J. STRATTON, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED JUNE 23, 1931

(35,992)

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

In Equity. No. 800

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

vs.

WILLIAM J. STRATTON, Secretary of State of the State of Illinois

CAPTION

Be it remembered that heretofore to wit: on the 21st day of July, in the year of our Lord one thousand nine hundred and twenty-seven, that being one of the days of the June Term, A. D. 1927, of the district court of the United States for the Southern Division of the Southern District of Illinois, there was filed in the office of the clerk of said court, a certain original bill of complaint against Louis L. Emmerson, Secretary of State of the State of Illinois (which said bill of complaint is not incorporated herein) and be it further remembered that afterwards, on to wit: the 11th day of February, in the year of our Lord one thousand nine hundred and thirty-one, that being one of the days of the January Term, A. D. 1931, of the district court of the United States for the Southern Division of the Southern District of Illinois, there was filed therein, a certain Stipulation for substitution of party defendant, upon which Stipulation an appropriate order was duly entered, which said Stipulation and Order thereon as well as the Amended Bill filed in pursuance thereof are in the words and figures, following, to wit:

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE SUBSTITUTION—Filed Feb. 11, 1931

It is stipulated by and between the above entitled parties, by their respective Solicitors, that William J. Stratton is

now the duly qualified and acting Secretary of State of the State of Illinois, succeeding Louis L. Emmerson, the above named defendant, and that said William J. Stratton, Secretary of State of the State of Illinois may be substituted as a party defendant for and in place of said Louis L. Emmerson.

Dated this 7th day of February, A. D. 1931.

Josiah Whitnel, Solicitors for Plaintiff. Oscar L. Carlstrom, Attorney General, by B. L. Catron, Asst. Atty. General, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER RESTORING CAUSE TO DOCKET AND SUBSTITUTING PARTY DEFENDANT—Filed Feb. 11, 1931

On this, the 11th day of February, 1931, this cause comes on to be heard on the Motion of the Plaintiff to set aside the Decree entered herein, on June 7, 1928, dismissing plaintiff's bill for want of equity, and re-docket this cause, both parties being represented in Court by their respective Solicitors, and on consideration thereof, it is ordered, adjudged and decreed that the decree entered hereon in June 7, 1928, dismissing Plaintiff's Bill of Complaint for want of equity and dissolved the temporary restraining order before that time entered herein, be and the same is hereby vacated and set aside, and it is ordered that this cause be restored to the docket.

And now again come the parties hereunto by their respective Solicitors, and stipulate that William J. Stratton is now the duly qualified and acting Secretary of State of the State of Illinois, succeeding Louis L. Emmerson, who is named as defendant in the Bill of Complaint filed herein. and that said William J. Stratton, as such Secretary of State of the State of Illinois be substituted as party defendant in this cause for and in place of said Louis L. Emmerson, Secretary of State of the State of Illinois.

[fol. 5] It is therefore ordered, adjudged and decreed by the Court that William J. Stratton, Secretary of State of the State of Illinois be substituted as party defendant in this cause for and in place of Louis L. Emmerson, Secretary of State, and that such substitution be without prejudice to any of the proceedings already had in this cause.

And now again come the parties to this cause, by their respective Solicitors, and it is stipulated by all the parties hereto that the plaintiff be permitted to file an amended Bill of Complaint herein, and it is therefore ordered, by the Court, that the plaintiff have leave to file an amended Bill of Complaint in this cause, and said Amended Bill of Complaint is accordingly ordered to be filed; and the Temporary Restraining Order heretofore entered herein remain in force and effect.

Enter.

Louis Fitzhenry, District Judge.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF ILLINOIS

No. 800

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

WILLIAM J. STRATTON, Secretary of State of the State of Illinois, Defendant

Amended Bill in Equity

AMENDED BILL OF COMPLAINT—Filed Feb. 11, 1931

To the Judges of the District Court of the United States for the Southern District of Illinois, in chancery sitting:

The plaintiff, St. Louis Southwestern Railway Company, a corporation, duly created and existing under the laws of the State of Missouri, and a citizen of said State of Missouri, having its principal office and principal place of business located in the City of St. Louis in said State of Mis-

souri, brings this, its Amended Bill of Complaint, with leave of Court first had and obtained, against William J. Stratton, Secretary of State of the State of Illinois, who resides at Springfield, in the State of Illinois, and who is a citizen of said State of Illinois, and who is the duly elected, qualified and acting Secretary of State of the State of Illinois, who is now and was at the time of the acts complained of herein, a citizen and resident of the State of Illinois, and complains against said defendant as follows:

[fol. 7] 1. The grounds upon which jurisdiction of this Court depend are:

(a) Diversity of citizenship between the parties hereto; the plaintiff being a citizen and resident of the State of Missouri and the defendant being a citizen and resident of the State of Illinois, and the matter in controversy exceeding the sum or value of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and this suit being of a civil nature in equity.

(b) This suit is of a civil nature in equity, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars, and arises under the Constitution of the United States, under subdivision 1 (a), Section 4, of the Judicial Code of the United States.

(c) This is a suit in equity, brought by the plaintiff to redress the deprivation by the defendant, under color of a Statute of the State of Illinois of rights, privileges and immunities secured to the plaintiff by the Constitution of the United States, within the Subdivision 14 of Section 4 of the Judicial Code of the United States; all of which is more fully hereinafter set forth.

2. The plaintiff, St. Louis, Southwestern Railway Company is a citizen of the State of Missouri and resides in the City of St. Louis, in said State, as is heretofore more fully set forth, and the defendant, William J. Stratton, Secretary of State of the State of Illinois, is a citizen and resident of the State of Illinois, and resides in Sangamon County in said State.

3. That on, to-wit, October 19, 1903, the plaintiff was a corporation with an authorized capital stock of $55,000,000.00, and seeking admission and authority to do business

in the State of Illinois, it, on to-wit, the 19th day of October, 1903, filed with James A. Rose, the then Secretary of State of the State of Illinois, its Affidavit and Statement seeking [fol. 8] such admission and having paid the sum of Ninety-five ($95.00) Dollars to the said then Secretary of State for said admission it was, on to-wit, October 19, 1903, duly authorized and admitted to do business in the State of Illinois for a term of eighty-eight (88) years from said date, as is evidenced by the Certificate of said James A. Rose, dated said date, and numbered 1748, a copy of which is Marked Exhibit "A," and is attached hereto and by reference made a part hereof; and that in and thereby it was certified that the amount of the plaintiff's capital stock represented in the State of Illinois was Fifty Thousand ($50,000.00) Dollars, and that the sum of Ninety-five ($95.00) Dollars paid by plaintiff to the Secretary of State was the initial admission fee exacted of plaintiff on the Fifty Thousand ($50,000.00) Dollars of its capital stock, so represented in the State of Illinois.

4. After the issuance of said Certificate of Authority to it, the plaintiff brought property into the State of Illinois and proceeded to transact business for which it is chartered in the State of Illinois.

5. Afterwards, by amendment of its Articles of Incorporation in the State of Missouri, the authorized capital stock of the plaintiff was increased from $55,000,000.00 to $130,000,000.00, and on, to-wit, February 13, 1922, plaintiff filed with the Secretary of State of the State of Illinois, a certificate of such increase of its authorized capital stock, and thereupon paid to Louis L. Emmerson the then Secretary of State of the State of Illinois, an initial fee of $315.45 on account of such increase.

6. That subsequent to October 19, 1903, the plaintiff brought property into the State of Illinois and transacted business in the State of Illinois, which property and business, as compared to the total of its property and business, represented more than $50,000.00 of its total, authorized capital and that such increase in the property brought into the State of Illinois, and business transacted in the State of Illinois was from time to time duly reported to the Secre- [fol. 9] tary of State of the State of Illinois, and the Secretary of State of the State of Illinois assessed additional in-

itial or admission fees for the additional authorized capital stock so represented in the State of Illinois. Plaintiff avers that the highest amount of its authorized capital represented by property and business in the State of Illinois did not exceed $5,500,000.00 our of the total authorized capital of $130,000,000.00 or to-wit, $1,533,324.43 of its issued capital stock of $36,249,750, and that it has never paid an initial or admission fee in the State of Illinois on more than $5,500,000.00 of its authorized capital stock.

7. Plaintiff avers that its authorized capital stock of $130,000,000.00 consists of 1,300,000 shares of stock of a par value of $100.00 each; and that on, to-wit, January 1, 1927, issued and outstanding stock of a par value of $36,249,750.00 and that the balance thereof was unissued; and the amount which had been actually issued appears by the copy of its charter then on file with the Secretary of State of the State of Illinois, and in the plaintiff's Annual Report for the year 1927, filed with Louis L. Emmerson, the then Secretary of State of the State of Illinois.

8. Plaintiff was on January 1, 1927, and has since then at all times been a common carrier by railroad, engaged in intrastate and interstate transportation of freight and passengers and as such is subject to the Interstate Commerce Act and the Transportation Act of the United States of America; that its line of railroad extends in and between the States of Illinois, Arkansas, Missouri, Louisiana, and Texas; that on to-wit, February 15, 1927, it filed with Louis L. Emmerson, the then Secretary of State of Illinois, an Annual Report sworn to by W. A. Conaway, complainant's Tax Agent, as is required by the laws of the State of Illinois, a copy of which annual report (the jurat being omitted) is attached hereto, marked "Exhibit B" and is by reference made a part hereof, and in which said Annual Report it was set forth, represented and reported to said Secretary of State; that the total value of the property of the plaintiff [fol. 10] in all States, during said year of 1926, was $76,793,697.79, and that the total business transacted by Plaintiff in all States during said year was $18,201,955.32; that the total value of the plaintiff's property for said year located in Illinois is $801,196.00 and that the total business transacted by plaintiff in said year at or from places of business in the State of Illinois is $2,868.36, all of which is more fully set

out upon the Annual Report heretofore referred to; that said Annual Report was filed with said Secretary of State under the provisions of Section 102 of the General Corporation Act of Illinois, which said Report so filed was used by the Secretary of State as the basis for determining the proportion of plaintiff's capital stock represented by property owned and business transacted in the State of Illinois, and in computing an annual franchise tax or license fee hereinafter more fully described, to be paid by the plaintiff for the year beginning July 1, 1927 and ending June 30, 1928.

9. There are two provisions of the General Corporation Act of Illinois, with reference to the computation and assessment of annual franchise taxes or license fees of corporations, which said tax or fees are exacted of all corporations, foreign and domestic, in addition to the initial fees heretofore required to be and heretofore paid by plaintiff for its authority to do business in the State of Illinois; and that by the provisions of Paragraph 105 of the General Corporation Act of Illinois, the franchise tax is based on the proportion of plaintiff's issued capital stock, which the property owned by it and located in Illinois, plus business done by it in Illinois, bears to the total of all property owned by it and all business done by it in all States; and that by Paragraph 107 of said Act, a scale of minimum taxes is provided for corporations owning no property and doing no business in the State of Illinois, which said scale of minimum [fol. 11] taxes or fees is figured on the issued stock of such corporations, and by which a corporation having an issued capital stock of $10,000,000.00 or less is required to pay an annual franchise tax or license fee of $1,000.00, a copy of which said paragraphs 105 and 107 of said General Corporation Act of Illinois are attached hereto, marked Exhibit C, and are by reference made a part hereof.

10. Plaintiff further avers that by reason of a proviso in Paragraph 105 of said Act it is provided that in no event shall the amount of the license fee or franchise tax of a foreign corporation be less than that required by the said Act of a corporation having no tangible property or business in the State of Illinois.

11. That if said franchise tax or license fee *be* paid by plaintiff for the period of July 1, 1927 to June 30, 1928, be computed according to the proportion of its issued capi-

tal stock represented by property owned and business done by it in Illinois, as compared to the total of its property and business done in all States, that then and in such case it would owe to the State of Illinois a tax of five (5¢) cents on $100.00 of .00746% of its issued capital stock, which tax would amount to $135.21, and which amount plaintiff is ready and willing, and at all times has been ready and willing to pay to the defendant herein, account said franchise tax.

12. That the predecessor in office of the defendant, William J. Stratton, to-wit: Louis L. Emmerson, as Secretary of State of the State of Illinois did, over the objection and protest of the plaintiff, assess said franchise tax or license fee for the year July 1, 1927 to June 30, 1928, at the sum of $1,000.00; that on being advised of said assessment plaintiff notified said Secretary of State that it objected to the amount of said tax as fixed by him and requested a hearing in regard thereto, and that said Secretary of State neglected, failed and refused to fix a time and place for said hearing, and that plaintiff's agent called at the office of said Secretary of State and explained fully [fol. 12] to his Assistant in charge of the Assessment of franchise taxes, the contention of plaintiff by virtue of which a franchise tax for the year July 1, 1927 to June 30, 1928, in an amount not exceeding $135.21, was due and that said Assistant, on behalf of and with the authority of said Louis L. Emmerson, insisted that a franchise tax of $1,000.00 was due and refused to change the amount of said tax as assessed; and informed plaintiff's agent of the purpose of said Secretary of State to insist upon the payment of the tax as so assessed, and in the event of nonpayment to enforce all of the penalties and forfeitures provided by law in the event of the nonpayment of such franchise tax.

13. Plaintiff further avers that the Secretary of State of Illinois claims that under said General Corporation Act of Illinois and particularly Sections 105 and 107 thereof, a minimum franchise tax for the year aforesaid based on the scale of minimums set forth in Section 107 of said Act, can be lawfully collected from corporations on the basis of the total amount of its issued capital stock, irrespective

of the amount of said issued capital stock represented by property owned and business done in the State of Illinois, while plaintiff denies that the State of Illinois can lawfully collect such minimum tax from it and that the tax that the State of Illinois may lawfully collect for said year is limited to 5¢ on each $100.00 of its issued capital stock represented by property owned and business done by it in the State during the calendar year of 1926; and contends that to permit defendant and the State of Illinois to collect said minimum tax based on the total amount of its issued capital stock would deprive plaintiff of its rights guaranteed to it by the Constitution of the United States of America.

1. Unreasonably burdening and directly taxing plaintiff's commerce between the states, in violation of Section 10 of Article I of the Constitution of the United States.

[fol. 13] 2. Taxing plaintiff's property and business outside the State of Illinois, and thereby depriving plaintiff of its property without due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Charging plaintiff more than was charged other corporations for the same privileges and discriminating against plaintiff in favor of other foreign and domestic corporations, thereby denying it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

And that as applied to it by the defendant, Paragraphs 105 and/or 107 of the General Corporation Act of Illinois are void.

14. Plaintiff further shows that there is no method provided by the laws of the State of Illinois for an appeal from the assessment of said tax as aforesaid by the defendants and his predecessor in office; and that there is no provision in said law whereby the fixing of said tax as aforesaid may be reviewed by a Court; that it is the duty of the defendant on the failure of plaintiff or any foreign corporation, to pay the franchise tax so assessed, to forfeit the right of such corporation to do business in the State of Illinois, and to make illegal and unlawful under

the laws of the State of Illinois any business, contract made by the plaintiff or such corporation in said State and to enforce divers penalties, including criminal prosecution, against the plaintiff, its officers or employees on the ground that it has failed to pay said tax, to comply with the General Corporation Act, and is unlawfully doing business in Illinois; that the Agent of the Secretary of State in charge of the assessment of said taxes has informed plaintiff of the purpose of the defendant to collect said tax of $1,000.00 as so assessed and on the nonpayment thereof it is the purpose of the defendant to enforce all of the forfeitures and penalties as provided by the laws of the State of Illinois.

[fol. 14] 15. Plaintiff represents that this is a suit in equity, brought to restrain the enforcement, operation and execution of the Statutes of the State of Illinois, known as the General Corporation Act of Illinois, and particularly Sections 105, 107, 92 and 114 thereof, which provide for the payment of a minimum franchise tax of $1,000.00, by plaintiff, based solely on plaintiff's total issued capital stock, on penalty of forfeiting plaintiff's authority to do business in the State of Illinois, and the suffering by plaintiff and plaintiff's employees by divers fines and penalties, by restraining an officer of said State, namely, the defendant, William J. Stratton, Secretary of State of the State of Illinois, from, after the payment of a tax of $135.21, by plaintiff, enforcing the aforesaid provisions of the said Statute, and foregoing provisions thereof, as sought to be applied to the plaintiff are void and unconstitutional under the provisions of the Constitution of the United States of America heretofore mentioned; that this suit is brought to prevent the defendant, under color of the said Illinois Statutes, from depriving it from privileges and immunities secured to it by the Constitution of the United States of America, and to prevent the defendant from depriving plaintiff under color of the aforesaid Statutes, of rights, privileges and immunities secured to the plaintiff by the Constitution of the United States of America; further, that this is a suit of a civil nature, being a Bill in Equity filed by the plaintiff, a citizen and resident of the State of Missouri, against the defendant, a citizen of the State of Illinois, to enjoin the defendant, his agents, attorneys

and employees from enforcing or undertaking to enforce against the plaintiff certain penalties provided by the Statute of the State of Illinois, account plaintiff's failure to pay the annual license fee or franchise tax heretofore referred to; that there is involved in this controversy the right and authority of plaintiff to do business in the State of Illinois, the value of which right, exclusive of interest [fol. 15] and costs, exceeds the sum of $3,000.00, and is of a worth to the plaintiff of the value of, to-wit, $5,000.00; and in this, that the defendant seeks to enforce the plaintiff to pay a franchise tax in the sum of $1,000.00 together with an additional penalty of 5% per month after August 1, 1927, which tax and penalties are made a first and prior lien upon the property of the plaintiff in the State of Illinois; that there is involved the right and authority of the plaintiff to do and transact business in the State of Illinois, which business and penalties would exceed the amount of $3,000.00; and that to revoke the authority of the plaintiff to do business in the State of Illinois would damage the plaintiff in the large sum of to-wit, $5,000.00 or more.

Plaintiff further represents that said Sections 105 and 107 of the General Corporation Act of Illinois, as applied to your orator by the defendant, William J. Stratton, are illegal and unconstitutional in that such application unreasonably interferes with and directly burdens Commerce between the different states in violation of Section 10 of Article I of the Constitution of the United States; and in that it deprives this plaintiff, a citizen of the State of Missouri, of privileges and immunities enjoyed in Illinois by the citizens of other states, in violation of Section 2 of Article IV of the Constitution of the United States; in that it abridges the privileges and immunities of the plaintiff, a citizen of the state of Missouri, discriminating against it in favor of other corporations, both foreign and domestic, similarly situated as to property owned and business done in Illinois, and deprives Plaintiff of its property without due process of law and denies your orator of the equal protection of the law, all in violation of the XIV Amendment to the Constitution of the United States; in that such application by said defendant, imposes a franchise tax based not upon the proportion of issued capital stock of the plaintiff, represented by property owned and business done in Illinois, but is

[fol. 16] based upon an arbitrary minimum franchise tax determined by the total issued capital stock of the plaintiff, which, when applied, results in a tax on the plaintiff larger than the tax imposed on like business and property within the State of Illinois.

Plaintiff further shows to the Court that because of its failure and refusal to pay said franchise tax as assessed against it, said defendant threatens, intends to and will take steps to revoke and terminate the authority of the plaintiff to do business in the State of Illinois; and institute proceedings to collect said tax and to enforce the penalties provided by said General Corporation Act against it, its officers and employees, and that by reason of the duties and powers placed upon the defendant, in and for the collection of said tax and in the enforcement of said penalties, the plaintiff is threatened with great and irreparable injury for which it cannot be adequately compensated at law, and has no adequate remedy at law.

Plaintiff further shows unto the Court that it cannot obtain relief or protection elsewhere than from the Court through the exercise of a writ of injunction to restrain said unlawful acts on the part of the defendant.

And in order that the plaintiff, its officers, employees, and property may be protected against the unlawful and unjustifiable threatened acts and actions of the defendant, the plaintiff respectfully prays:

1. That process of subpœna issue herein, directed to the defendant, William J. Stratton, as Secretary of State of the State of Illinois, directing him to appear and answer the allegations herein contained, but not under oath, answer under oath being hereby expressly waived.

2. That an injunction issue herein, perpetually enjoining the defendant, William J. Stratton, Secretary of State of the State of Illinois, and all successors, employees, attorneys, agents and all persons acting for and under his in-
[fol. 17] structions, from in any form or manner whatsoever assessing against the plaintiff any franchise or license tax whatsoever under the provisions of Sections 105 and 107 of the General Corporation Act of the State of Illinois, for the year beginning July 1, 1927, and ending June 30, 1928, in excess of the amount of $135.21, or from hereafter at any time assessing any franchise tax against the plain-

tiff, based on the minimum scale fixed by Section 107 of said Act, as applied by Section 105 of said Act.

3. That an injunction issue herein, perpetually enjoining the defendant, William J. Stratton, as Secretary of State of the State of Illinois, his successors, employees, clerks, agents, attorneys, and all persons acting for or under his instructions, from in any manner whatsoever revoking or taking steps to revoke the certificate of authority of the plaintiff to do business within the State of Illinois, because or on account of the refusal of Plaintiff to pay the Franchise Tax of $1000.00, as aforesaid, or any part thereof in excess of $135.21 assessed by him against the plaintiff.

4. That an injunction issue herein, perpetually enjoining the said defendant, William J. Stratton, as Secretary of State of the State of Illinois, his successors, employees, attorneys, agents and all persons acting for or under his instruction, from hindering or forbidding the plaintiff to transact business in the State of Illinois, or from instituting any proceedings or filing any complaint, either at law or in equity, or in any manner taking any steps whatsoever to enforce any of the penalties, forfeitures or prohibitions against the plaintiff, its officers and employees, on account of the refusal of the plaintiff to pay said franchise tax of $1,000.00 aforesaid, or any part thereof, in excess of $135.21, as assessed against it.

5. That a restraining order or a preliminary injunction be issued without delay, directed to William J. Stratton as Secretary of State of the State of Illinois, enjoining and restraining him as heretofore herein prayed for.

[fol. 18] And for such other and further relief as may appear to be just and reasonable.

St. Louis Southwestern Railway Company, by Josiah Whitnel, H. L. Browning, Solicitors for Plaintiff.

Duly sworn to by W. A. Conaway. Jurat omitted in printing.

[fol. 19] EXHIBIT "A" TO AMENDED BILL OF COMPLAINT

No. 1748

State of Illinois

Department of State

James A. Rose, Secretary of State

Certificate

Whereas St. Louis Southwestern Railway Company, Incorporated under the laws of the State of Missouri, has filed in the office of the Secretary of State duly authenticated evidence of its incorporation, as provided by law, and has, in all respects, complied with the requirements of law governing Foreign Corporations.

Now, therefore, I, James A. Rose, Secretary of State of the State of Illinois, in virtue and by authority of law, do hereby certify that said St. Louis Southwestern Railway Company is from the date hereof duly authorized to do business in the State of Illinois for a term of eighty-eight years and is entitled to all the rights and privileges granted to Foreign Corporations under the laws of this State, and that the amount of the Capital Stock of said Corporation is fifty five million Dollars and the amount of said capital stock represented in the State of Illinois is fifty thousand Dollars.

In testimony whereof I hereunto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 19th day of October, A. D. 1903, and of the Independence of the United States the one hundred and 28th.

(Signed) James A. Rose, Secretary of State. (Seal.)

[fol. 20] EXHIBIT "B" TO AMENDED BILL OF COMPLAINT

Annual Report

To Louis L. Emmerson, Secretary of State of the State of Illinois:

Report of St. Louis Southwestern Railway Company, Organized Under the Laws of the State of Missouri, as Required Under an Act Entitled "An Act in Relation to Corporations for Pecuniary Profit", Approved June 28, 1919, in Force July 1, 1919, and All Acts Amendatory Thereof

1. State your name and official position with the corporation. (Whether president, vice-president, secretary, assistant secretary, treasurer, receiver, assignee or trustee.) W. A. Conaway, Tax Agent.

2. The location of the principal business office of the corporation in the State of Illinois is at No. 505-511 First Nat'l Bank Bldg. in the City of East St. Louis County of St. Clair and the names and residences of the officers and directors of said corporation are as follows:

Names of Officers and Directors

Name	Office	Number and street	Residence, City, State
Daniel Upthegrove	President		St. Louis, Mo.
Paul J. Longua	Secretary		New York, N. Y.
C. Messick	Treasurer		St. Louis, Mo.
Edwin Gould	Director		New York, N. Y.
Charles Hayden	Director		" "
L. F. Loree	Director		" "
Winslow S. Pierce	Director		" "
Paul Rosenthal	Director		" "
E. Roland Harriman	Director		" "
Daniel Upthegrove	Director		St. Louis, Mo.
Carl F. G. Meyer	Director		" "
F. W. Green	Director		" "

NOTICE.—Must give officers and show management of corporation is vested in at least three Directors.

3. Has the corporation acquired title to any real estate in securing any debt or liability due it?

Ans. No.

4. Give a description of such property, if any has been acquired, and the date of the acquisition and disposal of such property.

None.

5. Has the corporation entered into any illegal pool, trust, agreement, combination, confederation or understanding in restraint of trade in contravention of any Act of this State concerning such matters?

Ans. No.

6. State the amount of authorized capital stock of corporation. Authorized is $130,000,000.00; Issued and outstanding is $36,249,750.00; Shares of no par value, None.

When a corporation has shares of no par value such shares must be reported separately.

[fol. 21] 7. Does the corporation wish to pay a franchise tax based upon its entire authorized capital stock?

Ans. No.

8. In the event that the corporation is assessed a franchise tax upon its entire authorized capitalization, will it be paid promptly?

Ans. ——.

9. State briefly the nature of business in which the corporation is actively engaged under its charter at the present time. State and Interstate transportation of freight, passengers, mail, express and baggage. ——.

10. Give the total value of all the property of the corporation everywhere, specifying:

(a) Value of patent rights, licenses, trade-marks, secret processes, copyrights, good will, contracts, or choses in action.

Ans. None.

(b) Merchandise raw materials and goods in process of manufacture.

Ans. None.

(c) Book accounts and notes.

Ans. $433,713.62

(d) Machinery and real estate Inc. in road and equipment.

(e) Stock in other corporations and securities.

Ans. $10,740,691.92.

(f) Furniture, fixtures, stationery Inc. in road & equipment.

(g) Cash in bank.

Ans. $1,583,502.11.

(h) Kinds and amounts of other property, specifying in detail; Road & equipment $76,793,697.79.

11. Give the total value of all the property of the corporation located in Illinois, specifying:

(a) Value of the patent rights, trade-marks, secret processes, copyrights, good will, contracts or choases in action.

Ans. None.

(b) Merchandise, raw materials and goods in process of manufacture.

Ans. None.

(c) Book accounts and notes.

Ans. None.

(d) Machinery and real estate.

—. None.

(e) Stock in other corporations and securities.

Ans. $15,000.00.

(f) Furniture, fixtures, stationery.

— None.

(g) Cash in bank.

Ans. None.

(h) Kinds and amounts of other property, specifying in detail: Illinois proportion of rolling stock, $786,196.00.

12. Give the location of the principal places of business of the corporation in each State, and the amount of business transacted through each, last year. Various stations along line in States of Missouri, Arkansas and Louisiana.

13. State the total business of the corporation transacted everywhere during the past year. $18,201,955.32.

[fol. 22] 14. State the total business of the corporation for the past year transacted by it at or from places of business in the State of Illinois.

Ans. $2,868.36.

15. In case of a telegraph, telephone, cable, railroad, or pipe line company, state the total length of such telegraph, telephone, cable, railroad or pipe line, wherever located. 940.58.

16. State the length of such telegraph, telephone, cable, railroad or pipe line actually located in Illinois.

None.

17. From what office are the affairs of the corporation managed?

Ans. Daniel Upthegrove, President, Buder Bldg., St. Louis, Mo.

18. To what office or offices are all contracts with the corporation forwarded for final acceptance?

Ans. Same as #17.

19. Is the corporation actually transacting business at the present time in the State where it was incorporated?

Ans. Yes.

20. At what office or offices are directors and stockholders meetings held?

Ans. Buder Bldg., St. Louis, Mo.

In witness whereof I have hereunto set my hand and caused the seal of said corporation to be affixed this — day of February, A. D. 1927.

(Signed) W. A. Conaway, Tax Agent. (Affix corporate seal here.)

STATE OF MISSOURI,
City of St. Louis, ss:

I, W. A. Conaway, being duly sworn, declare on oath that I am Tax Agent of the corporation mentioned in the foregoing report, and that all the statements therein made are true.

—— ——

Subscribed and sworn to before me this — day of February, A. D. 1927. —— ——, Notary Public. (Notarial Seal.)

[fols. 23 & 24] EXHIBIT "C" TO AMENDED BILL OF COMPLAINT

No. 105. Annual License Fee or Franchise Tax—Amount—Minimum—No Par Value Stock.—"Each cor-

poration for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or busines in this state.

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

No. 106. Ascertainment of License Fee or Franchise Tax in Case of Corporations Generally.—"In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation, and the total property of the corporation wherever situated."

No. 107. In case it appears from the annual report that the corporation has no property located in this State, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporation- having issued. capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15.00; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; and all corporations

having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR INTERLOCUTORY INJUNCTION—Filed Feb. 11, 1931

To the Honorable the Judges of the District Court of the United States for the Southern District of Illinois, Southern Division:

Upon the verified Bill of Complaint filed herein and the Affidavit of W. A. Conaway, annexed thereto, and upon the proceedings had herein, the St. Louis Southwestern Railway Company, the plaintiff above named, makes application to your Honors for a writ of injunction enjoining and restraining, pending the final judgment in this action, and until the further order of this Court, the defendant and his officers, agents, servants and employees, and any and every other person acting under and by virtue of the authority of the Secretary of State of the State of Illinois and the General Corporation Act of Illinois, and any other law of the State of Illinois, in so far as any of said laws relates or provides for the enforcement of the penalties and forfeitures provided for by said General Corporation Act of Illinois, to be enforced against this plaintiff account its failure to pay franchise or license tax assessed in the sum of $1000.00 to the State of Illinois, for the year beginning July 1, 1926, and ending June 30, 1927, and plaintiff prays your Honors to call to your Honors' assistance to hear and determine this application, two other judges in accordance with the provisions of Section 266 of the Judicial Code, and to expedite the hearing of this application, and set the same down for hearing at the earliest practical [fols. 26 & 27] date; and for such other and further relief as to the Court may seem just and proper in the premises.

Dated at East St. Louis, Illinois, this 7th day of February, A. D. 1931.

Josiah Whitnel, H. L. Browning, Solicitors for Plaintiff.

[File endorsement omitted.]

[fols. 28 & 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING STATUTORY THREE-JUDGE COURT—Filed Feb. 13, 1931

Pursuant to Section 266 of the Judicial Code, on application to me by St. Louis Southwestern Railway Company, plaintiff in the above entitled cause, for an interlocutory injunction in said cause, and it appearing that the Bill of Complaint in said cause is brought to enjoin the enforcement of a statute of the State of Illinois, on the ground that such statute as applied to the Plaintiff is a violation of the Constitution of the United States, and the Defendant having filed a motion to dismiss said Bill for want of equity,

I hereby call to my assistance for the hearing of said application and motions, the Honorable Samuel Alschuler, Senior United States Circuit Judge, and the Honorable George T. Page, a retired Circuit Judge for the Seventh Circuit and assigned to the Southern District of Illinois, said hearing to be held at the Court House in Springfield, in the Southern District of Illinois, on Wednesday, the 18th day of February, A. D. 1931, at ten o'clock A. M.

Dated February 13, 1931.

Louis Fitzhenry, District Judge.

[File endorsement omitted.]

[fols. 30 & 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed Feb. 11, 1931

And now comes the above named defendant, by Oscar E. Carlstrom, Attorney General of the State of Illinois, his attorney, and moves the Court to dismiss the amended bill of complaint filed herein for want of equity, and to grant such other and further relief in the premises as may be just.

Oscar E. Carlstrom, Attorney General of the State of Illinois, Attorney for Defendant. B. L. Catron, Assistant Attorney General, of Counsel.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING—Filed Feb. 18, 1931

To the Honorable Louis L. Emmerson, Governor of the State of Illinois, and to the Honorable Oscar E. Carlstrom, Attorney General of the State of Illinois:

You and each of you are hereby given notice, pursuant to the provisions of Section 266 of the Judicial Code, that the District Court of the United States for the Southern District of Illinois, Southern Division, has set for hearing and determination in the Federal Court Room in the Post Office Building in the City of Springfield, State of Illinois, on the 18th day of February, 1931, at 10:00 o'clock in the forenoon of said day, the application for a preliminary or interlocutory injunction in the suit above entitled, brought by the St. Louis Southwestern Railway Company, Plaintiff, against William J. Stratton (successor to Louis L. Emmerson), Secretary of State of the State of Illinois, being cause numbered 800, In Equity, to enjoin the enforcement of the provisions of the General Corporation Act of Illinois, by enjoining William J. Stratton as Secretary of State of Illinois, from forfeiting the authority of the plaintiff to do business in said State and from enforcing the fines, penal-

ties and forfeitures account the failure of the plaintiff to pay a franchise tax of One Thousand ($1,000.00) Dollars assessed against it for the year July 1, 1926, to June 30, 1927, on the ground that said Statute, as applied to the plaintiff, violates the Constitution of the United States in [fol. 33] that such enforcement would unreasonably interfere with and directly burden commerce between the different states, carried on by plaintiff, in violation of Section 10 of Article I of the Constitution of the United States; and would deprive the plaintiff, a citizen of the State of Missouri, of privileges and immunities enjoyed in Illinois by the citizens of other states, in violation of Section 2 of Article IV of the Constitution of the United States; and would abridge privileges and immunities of plaintiff, a citizen of the State of Missouri, and would deprive the plaintiff of equal protection of the laws and would deprive plaintiff of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

There is served upon each of you herewith, copies of the Bill of Complaint in said cause, copies of Motion for Interlocutory Injunction and the Order of the District Court granting a temporary restraining order and convoking a three-judge Court for the hearing of said application for an interlocutory injunction, as provided for by said Section 266 of the Judicial Code.

Dated at East St. Louis, Illinois, this 11the day of February, A. D. 1931.

Josiah Whitnel, H. L. Browning, Solicitors for Plaintiff.

Service of the foregoing notice accepted this 12th day of February, A. D. 1931.

Louis L. Emmerson, Governor of the State of Illinois. Oscar E. Carlstrom, Attorney General of the State of Illinois.

[File endorsement omitted.]

[fol. 34] [Caption omitted]

[fols. 35 & 36] Minute entry of argument and submission Wednesday, February 18, 1931, omitted in printing.

[fol. 37] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

No. Eq. 800

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

vs.

WILLIAM J. STRATTON, Secretary of State of the State of Illinois

Before Alschuler and Page, Circuit Judges, and FitzHenry, District Judge

OPINION—Filed Mar. 7, 1931

Per Curiam:

Upon remandment of this cause to the Circuit Court of Appeals, pursuant to the decision of the Supreme Court in Stratton v. St. Louis Southwestern Ry. Co., 282 U. S. 10, the appeal to the Circuit Court of Appeals was dismissed. Thereupon the District Court, with three judges sitting, heard plaintiff's application for temporary injunction, and defendant's motion to dismiss the bill for want of equity.

The facts are as stated in the Supreme Court opinion. Plaintiff's amended bill, filed after the dismissal of the appeal is in all essential respects like the original bill.

One of the judges here sitting has hitherto expressed his views of the case in an opinion appearing in 27 F. (2d) 1095, and the other two of the judges have heretofore concurred in opposite views in an opinion reported in 30 F. (2d) 322. Whatever, after the full and able presentation of the case before us, may be the respective views of the Judges as to those opinions, it appears that the question involved has been definitely settled by a later decision by the Supreme Court in the case of Cudahy Packing Co. v. Hinkle, Secretary of State, et al, 278 U. S. 460. This case

[fols. 38 & 39] involved a statute of Washington in all essential respects like the one herein issue. A tax similar to that here demanded was there sought to be imposed, and the Supreme Court held the statute, as applied to the tax there involved to be unconstitutional. In view of the discussion there presented our further elaboration will be quite unnecessary.

Temporary injunction is hereby awarded in accordance with the prayer of the bill.

Defendant's motion to dismiss the bill for want of equity is denied.

Defendant having elected to stand by his motion to dismiss the bill for want of equity, final decree will be entered awarding plaintiff a permanent injunction as prayed for in its bill of complaint.

Samuel Alschuler, George T. Page, C. J.; Louis FitzHenry.

[File endorsement omitted.]

[fols. 40 & 41] In United States District Court

[Title omitted]

Exceptions to Order Granting Injunction—Filed April 27, 1931

Now comes the defendant, William J. Stratton, as Secretary of State of Illinois, by Oscar E. Carlstrom, Attorney General, his solicitor, and excepts to the decision and order of Court entered herein granting an interlocutory injunction against this defendant, as set forth in said order, and denying the motion of this defendant to dismiss the amended bill of complaint herein, and upon the election of this defendant to stand by his motion to dismiss said bill, further ordering that a permanent injunction be awarded the plaintiff as prayed in said amended bill of complaint and as set forth in said order, and prays the Court to allow it an exception on account thereof.

Oscar E. Carlstrom, Attorney General, Solicitor for Defendant. B. L. Catron, Assistant Attorney General, of Counsel.

[File endorsement omitted.]

[fol. 42] Statutory three-judge court convened pursuant to Section 266 of the Judicial Code, the Honorable Samuel Alschuler, senior United States circuit judge; the Honorable George T. Page, retired circuit judge for the Seventh Circuit assigned to the Southern District of Illinois, and the Honorable Louis FitzHenry, judge of the District Court of the United States, for the Southern District of Illinois, Southern Division.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION

In Equity. No. 800

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Plaintiff,

vs.

WILLIAM J. STRATTON, Secretary of State of the State of Illinois, Defendant

DECREE GRANTING INTERLOCUTORY AND PERMANENT INJUNCTION, ALLOWING APPEAL, ETC.—Filed April 27, 1931

This cause came on for hearing on February 18, 1931, before a Statutory Three-Judge Court convened by the Honorable Louis Fitzhenry, District Judge for the Southern District of Illinois, Southern Division, by calling to his assistance the Honorable Samuel Alschuler, Justice of the Circuit Court of Appeals for the Seventh Circuit and the Honorable George T. Page, a retired Circuit Judge for the Seventh Circuit and assigned to the Southern District of Illinois, pursuant to Section 266 of the Judicial Code, upon the application of the St. Louis Southwestern Railway Company, plaintiff, in the above entitled cause, for an interlocutory injunction, pursuant to plaintiff's Bill of Complaint, praying an interlocutory and Final Decree, enjoining and restraining the enforcement of Sections 92, 105, 107 and 114 of the General Corporation Act of the State of Illi-
[fol. 43] nois, as applied to the plaintiff by William J. Stratton, Secretary of State of Illinois, defendant, by enjoining said defendant, his successors in office, attorneys, agents and all persons acting for and under his instruction, from forfeiting the authority of the plaintiff to do business in the State of Illinois and from enforcing divers penalties and forfeitures provided by the statutes of the State of Illinois in force on account of the plaintiff's failure to pay a franchise tax for the year July 1, 1927 to June 30, 1928, as-

sessed in the amount of One Thousand ($1,000.00) Dollars, or in any amount exceeding One Hundred Thirty-five and 21/100 ($135.21) Dollars, on the ground that said Statutes, as sought to be applied to the plaintiff, violate the Constitution of the United States, in that they act to deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; unreasonably burden and directly tax interstate commerce between the State, carried on by the plaintiff, in violation of Section 10, Article I of the Constitution of the United States; and discriminate against the plaintiff and in favor of other foreign and domestic corporations, denying plaintiff equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States; said Court being also convened to consider the Motion by the defendant, William J. Stratton, Secretary of State, to Dismiss said Bill of Complaint; for want of equity; and upon consideration of the verified Bill of Complaint and the Affidavit of W. A. Conaway, in support thereof and after hearing evidence, both in support of and in opposition to said application, and it appearing that said application was duly set down for hearing at Springfield, Illinois, on the 18th day of February, 1931, and that five days notice of said hearing had been waived by the defendant in this cause, as well as by the Honorable Louis L. Emmerson, Governor of the State of Illinois, and the Honorable Oscar E. Carlstrom, Attorney Gen-
[fol. 44] eral of the State of Illinois, and after hearing Counsel, said cause is taken under advisement; and now on this the 27th day of April, 1931, this cause again comes on for hearing and after consideration thereof,

It is ordered, adjudged and decreed by said Three Judge Court that the defendant, William J. Stratton, Secretary of State of the State of Illinois, his successors in office, attorneys, agents, employees and all persons acting under his authority be and they are hereby enjoined pending further order herein, from forfeiting the right of plaintiff to transact business in the State of Illinois, or in any manner taking any steps whatsoever to enforce any of the penalties, forfeitures and prohibitions against the plaintiff, its officers and employees on account of its refusal to pay a franchise tax in the amount of One Thousand ($1,000.) Dollars, from July 1, 1927 to June 30, 1928, or to pay any franchise tax

for said year in excess of the sum of One Hundred Thirty-five and 21/100 ($135.21) Dollars.

It is further ordered, adjudged and decreed, that the Motion by the defendant to dismiss the Bill of Complaint be denied; and the defendant having elected to stand by his motion to dismiss the Bill of Complaint for want of equity, it is further ordered, adjudged and decreed that a Permanent Injunction be awarded the plaintiff as prayed for in said Bill of Complaint and as hereinbefore is set forth.

Whereupon, the defendant excepts to the Decree of the Court granting said interlocutory injunction, denying his motion to dismiss and in granting a permanent injunction herein and prays an appeal to the Supreme Court of the United States and the defendant having presented and filed his petition for appeal, assignment of errors and prayer for reversal, pursuant to the mandates and rules of the Supreme Court of the United States in such case made and provided:

It is therefore ordered, adjudged and decreed that an appeal be and the same is hereby allowed to the Supreme Court of the United States from this Court, as is provided by law. [fols. 45 & 46] And it is further ordered, that the Clerk of the United States District Court, for the Southern District of Illinois, Southern Division, shall prepare and certify a transcript of the record, proceedings and papers upon which said Orders were made in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same there within thirty (30) days of this time.

And it is further ordered, that security for costs, on appeal herein be fixed at Five Hundred ($500.00) Dollars.

Samuel Alschuler, Circuit Judge, Seventh Circuit.
George T. Page, Circuit Judge, Seventh Circuit.
Louis Fitzhenry, District Judge for the Southern District of Illinois.

[File endorsement omitted.]

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed April 27, 1931

The defendant, William J. Stratton, as Secretary of State of Illinois, considering himself aggrieved by the orders and

decree made and entered herein on the 27th day of April, 1931, by the Statutory Three Judge Court convened herein, granting an interlocutory injunction against this defendant as prayed in the amended bill of complaint herein and as set forth in said order, and denying the motion of this defendant to dismiss the said bill and further ordering that a permanent injunction is awarded the plaintiff as prayed in his said bill and set forth in said order, hereby prays that an appeal from said orders and decree to the Supreme Court of the United States may be allowed for the reasons specified and set forth in the assignment of errors hereinafter set forth, and that the amount of bond thereon may be fixed by the Court and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, may be made and transmitted to the Supreme Court of the United States, as provided by law.

Assignment of Errors

And the said appellant hereby assigns the following errors in the record and proceedings in said cause:

[fol. 48] 1. The said Statutory Court erred in ordering and decreeing that this appellant and his successors in office, atttorneys, agents, employees and all persons acting under him be enjoined, pending the further order in said cause, from forfeiting the authority of the appellee herein to do business in the State of Illinois and from enforcing the provisions of the statutes of the State of Illinois, on account of the failure of the appellee herein to pay the franchise tax assessed against it in the amount of $1000, for the privilege granted to exercise its franchise in said State for the year beginning July 1, 1927, and ending June 30, 1928, as set forth in said order.

2. The said Statutory Court erred in denying the motion of this appellant to dismiss the amended bill of complaint for want of equity.

3. The said Statutory Court erred in further ordering that a permanent injunction be awarded to the appellee herein as prayed for in its said bill of complaint and as set forth in said decree.

4. The said Statutory Court erred in refusing to allow the said motion of this appellant to dismiss the said bill of

complaint for want of equity, for the reason that the said franchise tax assessed by this appellant against the appellee for the privileges granted to it by said State for said year did not impose any unlawful burden on the interstate commerce of the appellee, or deprive it of any of its property without due process of law, or deny it equal protection of the laws, or abridge any of its privileges or immunities as a citizen, or violate any provision of the Constitution of the United States or the Fourteenth Amendment thereto, as alleged in said amended bill of complaint.

5. The said Statutory Court erred in holding in effect that Section 107 of the General Corporation Act of Illinois, as applied to the appellee herein imposes an invalid tax under the decision referred to in the opinion filed by said Court herein, or any of the decisions of the Supreme Court of the United States.

[fols. 49 & 50] 6. The said Statutory Court erred in holding in effect that said Corporation Act of said State, as applied to the appellee herein, imposes an unlawful burden upon the capital, property or business of the appellee outside of said State, or discriminates against the appellee or denies to it the equal protection of the laws, or takes any of its property without due process of law, as alleged in the said amended bill of complaint.

Prayer for Reversal

For each and all of which said errors the appellant herein prays that the said orders and decree of the said Statutory Court in said cause may be reversed, set aside and for naught held and that said cause may be remanded to said District Court with instructions to dismiss said amended bill of complaint for want of equity.

Oscar E. Carlstrom, Attorney General, Solicitor for Appellant. B. L. Catron, Assistant Attorney General, of Counsel.

[File endorsement omitted.]

[fols. 51-55] Bond on appeal for $500.00, approved and filed May 7, 1931, omitted in printing.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 6, 1931

To the Honorable S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois, Southern Division:

You will please prepare a transcript of the record in the above entitled cause, for appeal to the Supreme Court of the United States, and include therein the following, to-wit:

1. Placita.
2. Stipulation and order for substitution and amended bill.
3. Amended Bill of Complaint.
4. Motion for Interlocutory Injunction.
5. Order convening Statutory Three Judge Court.
6. Notice to Governor and Attorney General.
7. Motion to dismiss Amended Bill of Complaint.
8. Opinion and Orders of Statutory Three Judge Court.
9. Exceptions to order granting injunction, etc.
10. Decree granting Interlocutory and Permanent Injunction and denying Motion to dismiss amended bill of complaint, with order allowing appeal and fixing bond for appeal.

[fol. 57] 11. Petition for appeal to the Supreme Court of the United States, with assignment of errors and prayer for reversal.

12. Bond on appeal and approval of same.
13. Citation and return thereon.
14. Præcipe for record with proof of service.
15. All other orders and proceedings of said District Court of the United States subsequent to the filing of the amended bill of complaint in said cause.

Dated this 5th day of May, A. D. 1931.

Oscar E. Carlstrom, Attorney General of Illinois, Counsel for Appellant. B. L. Catron, Assistant Attorney General, of Counsel.

Received a copy of the foregoing præcipe for record this 6th day of May, 1931.

Josiah Whitnel, H. L. Browning, Counsel for Appellee.

[File endorsement omitted.]

[fol. 58] Citation, in usual form, showing service on Josiah Whitnel and J. R. Turney, filed May 7, 1931, omitted in printing.

[fol. 59] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 60] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed June 26, 1931

Comes now the appellant in the above entitled cause and states that he adopts his assignments of error as his statement of the points upon which he intends to rely in this Court in this case.

And the appellant further states and represents that the whole of the record in said cause, as filed herein, is necessary for the consideration of the case in this Court.

Oscar E. Carlstrom, Attorney General of the State of Illinois, Counsel for Appellant. B. L. Catron, Assistant Attorney General, of Counsel.

Received a copy of the foregoing statement of points to be relied upon and designation of parts of record to be printed in the above entitled cause this 22nd day of June, 1931.

Josiah Whitnel, Counsel for Appellee.

[fol. 61] [File endorsement omitted.]

Endorsed on cover: File No. 35,992. S. Illinois D. C. U. S. Term No. 178. William J. Stratton, as Secretary of State of the State of Illinois, appellant, vs. St. Louis Southwestern Railway Company. Filed June 23, 1931. File No. 35,992.

FILE COPY

JUN 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 178

WILLIAM J. STRATTON, Secretary of State of the State of Illinois, Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation, Appellee.

APPEAL FROM STATUTORY DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

STATEMENT AS TO JURISDICTION ON APPEAL.

Oscar E. Carlstrom,
Attorney General of Illinois,
Counsel for Appellant.

Bayard Lacey Catron,
Assistant Attorney General,
Of Counsel for Appellant.

PHILLIPS BROS.' PRINT.
SPRINGFIELD, ILLINOIS.

(59290)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No.....

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

I.

Statutory Provision Sustaining Jurisdiction.

This appeal is taken pursuant to Section 266 of the Judicial Code, as amended by the Act of February 13, 1925, which provides in part as follows:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.*** The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit (U. S. C., Title 28, Sec. 380; 43 Stat. 938)."

II.

Date of Decree and Application for Appeal.

The decree sought to be reviewed was entered in the District Court of the United State for the Southern District of Illinois, on the 27th day of April, 1931, and the application for appeal from such decree, with assign-

ments of error and prayer for reversal, was presented to the Court and allowed on the same date (R. 40-50).

III.

Nature of Case and Ruling Below.

The St. Louis Southwestern Railway Company, a corporation organized under the laws of the State of Missouri and authorized to do business in the State of Illinois, filed its amended bill in the District Court of the United States for the Southern District of Illinois, to enjoin the Secretary of State of the State of Illinois from assessing and collecting an annual franchise tax against it under Section 107 of the General Corporation Act of Illinois, which provides for a minimum tax based on the total issued capital stock, with a maximum limit in amount, which was applied to the plaintiff pursuant to the last clause of Section 105 of said Act (R. 4-24).

The bill alleges that the tax as assessed by the Secretary of State under Section 107 of said Act would place an unreasonable burden on interstate commerce and deprive the plaintiff of its privileges and immunities as a citizen, under paragraph 3 of Section 8 and Section 10 of Article I, and Section 2 of Article IV, respectively, of the Constitution of the United States, and would also deny the plaintiff the equal protection of the laws and

deprive it of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United State (R. 12-14).

The plaintiff prayed in its amended bill for both a preliminary and permanent injunction against the defendant to prevent him from instituting or prosecuting any proceedings to collect the tax assessed or to enforce any of the penalties prescribed by the Act for failure or refusal to pay such tax (R. 16-18). The plaintiff also filed a motion for a temporary injunction as prayed in the bill (R. 27-30). The defendant filed a motion to dismiss the bill for want of equity (R. 31-2). District Judge FitzHenry thereupon called to his assistance Circuit Judges Alschuler and Page for the purpose of hearing the application for a temporary injunction and motion to dismiss the bill (R. 35).

Upon the hearing the statutory court awarded a temporary injunction and denied the motion to dismiss the bill for want of equity, and defendant having elected to stand by his motion, the court also awarded a final decree for a permanent injunction as prayed in the bill. (R. 38-40.) The orders and decree to that effect were thereafter entered by the court on April 27, 1931, to which the defendant excepted and prayed an appeal to this

Court, which was allowed, the defendant having filed his petition for appeal, assignment of errors and prayer for reversal on the same date. (R. 42-50.)

The alleged errors assigned included the granting of the preliminary injunction as prayed against the defendant, denying his motion to dismiss the amended bill and ordering that a permanent injunction be issued against appellant as prayed in the bill; also, in refusing to hold that the tax assessed did not impose any unlawful burden upon the interstate commerce of appellee, or violate any provision of the Constitution of the United States or the Fourteenth Amendment thereto, as alleged in the bill, and holding in effect that Section 107 of the General Corporation Act of Illinois, as applied to appellee, imposed an invalid tax under the decisions of this Court, or imposed an unlawful burden upon the capital, property or business of appellee outside of that state, or discriminated against it or denied it the equal protection of the laws, or took any of its property without due process of law, as alleged in said amended bill. (R. 46-48.)

The appeal bond for costs as required by the court was duly filed and approved. (R. 51-2.) A citation was also issued to the appellee corporation, service of which

was acknowledged by the attorneys for appellee and filed herein, within thirty days, as provided by law. (R. 53-55.)

IV.

Cases Believed to Sustain Jurisdiction.

This is the same case in which a prior appeal was considered by this Court in 282 U. S. 10. The hearing on the application for the preliminary injunction, together with the motion to dismiss, and the order entered thereon, from which the present appeal was taken to this Court, is pursuant to the procedure required by the statute, as held by the Court in that decision and in other cases there cited by the Court. (*Chicago Great Western Railway Co.* v. *Kendall*, 266 U. S. 94, 97).

The appellant therefore respectfully submits that this Court has jurisdiction of this appeal under Section 266 of the Judicial Code, as amended by the Act of February 13, 1925, upon the proceedings above mentioned and set forth in the record herein.

Respectfully submitted,

Oscar E. Carlstrom,
Attorney General of Illinois,
Counsel for Appellant.

Bayard Lacey Catron,
Assistant Attorney General,
Of Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 178

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

v.

ST. LOUIS SOUHTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM STATUTORY DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT.

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Counsel for Appellant.

BAYARD LACEY CATRON,
Assistant Attorney General,
Of Counsel for Appellant.

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SPRINGFIELD, ILLINOIS.

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STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This is an appeal from a decree entered in the District Court of the United States for the Southern District of Illinois, by a statutory court of three judges under the provisions of Section 266 of the Judicial Code, as amended by the Act of February 13, 1925. That Court granted a decree for a temporary injunction as prayed in the amended

bill filed by appellee against the appellant, and denied the motion of appellant to dismiss the bill for want of equity, and thereupon, appellant having elected to stand by his motion, the Court by the decree awarded a permanent injunction against appellant, as prayed in the bill, for the reason stated in the opinion of the Court. (R. 24-28.)

The original bill in this case was filed in said District Court on July 21, 1927, and upon the motion of appellant was dismissed by the District Judge, for the reasons set forth in his opinion, as reported in 27 Fed. (2nd) 1005. The appellee then appealed to the Circuit Court of Appeals for the Seventh Circuit, which reversed the order of the District Court on the grounds stated in its opinion reported in 30 Fed. (2nd) 322. Appellant then appealed to this Court, and upon the hearing this Court held that the District Judge was without authority to hear and determine the motion to dismiss the bill, but that he should have called two other judges to his assistance in determining the application for a temporary injunction, and therefore reversed the order of the Circuit Court of Appeals and remanded the cause to that Court with directions to dismiss the appeal to it for want of jurisdiction, as shown by the opinion of this Court in 282 U. S. 10.

Pursuant to that decision, the cause was remanded and thereafter reinstated in the District Court for further proceedings, in conformity with the opinion of this Court. An amended bill of complaint was then filed by appellee, which is substantially the same as the original bill. The amended

bill shows that the appellee corporation was organized under the laws of the State of Missouri, and was admitted to do business in Illinois on October 19, 1903. Appellee at that time had authorized capital stock in the amount of $55,000,000, of which $50,000 was then represented in Illinois. Appellee afterwards increased its authorized capital stock to $130,000,000, and also increased from time to time its business and property in Illinois until it represented $5,500,000 of its authorized capital stock, on which it paid initial or admission fees in that state. Its issued capital stock was increased to $36,294,750, as shown by its report for the year 1927, which was filed with the Secretary of State of Illinois. (R. 3-6.)

The amended bill also shows that appellee is a common carrier by railroad, engaged in intrastate and interstate transportation of freight and passengers in Illinois and several other states. The annual report filed by it in February, 1927, showed that the total value of its property in all states in the year 1926 was $76,793,697.79, and that the total business transacted by it during that year was $18,201,955.33. The total value of its property located in Illinois was $801,196.00, and the local business transacted by it in that state during that year was $2,868.36, as set forth in its annual report for that year. (R. 6-7.)

Section 102 of the Illinois Corporation Act requires both domestic and foreign corporations, including railroads, to make a report in writing to the Secretary of State in February of each year on forms furnished by him. The

report relating to property and business is made for the preceding calendar year and is required to disclose such facts as to enable him to ascertain the proportion of capital stock represented by business transacted and tangible property located in that State, in order to assess the annual license fee or franchise tax in advance for the next year beginning July 1. Sections 105, 106 and 107 of said Act provide for the payment of the fee or tax to be assessed as follows:

> Section 105. Each corporation for profit including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, **but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.**
>
> Section 106. In ascertaining the amount of the capital stock represented by business transacted and property located in this State, the sum of the business of any foreign or domestic corporation transacted in this State and the total property of such corporation located within this State shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated.
>
> Section 107. In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having

issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; **and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.** (Ex. "C", R. 7, 18-20).

As appellee had issued capital stock in the amount of $36,249,750, it appeared that it should pay at least a minimum fee of $1,000 for the renewal of its privilege of doing business in Illinois for the next year, under the last clauses of Sections 105 and 107. The annual report filed by appellee showed that it had used such a small proportion of its capital stock in Illinois during the preceding year that a tax at the rate specified in Section 105 would be less than the minimum fee of $1,000 specified in Section 107. Therefore, that amount was assessed against appellee, as the minimum fee required to be paid for the privileges granted to it as a corporation having issued capital stock in excess of $20,000,000 (R. 7).

The amended bill filed by appellee alleges that the statute and the tax assessed thereunder placed an unreasonable burden upon its interstate commerce, in violation of Section 10 of Article 1 of the Constitution of the United States, and would deprive it of its privileges and immuni-

ties, in violation of Section 2 of Article IV of such Constitution, and would also deprive it of its property without due process of law and deny it the equal protection of the laws, contrary to the Fourteenth Amendment to said Constitution. Appellee sought both a temporary and a permanent injunction to prevent appellant from enforcing the collection of the tax assessed against it (R. 9-13).

A motion was filed by appellee for an interlocutory injunction and appellant filed a motion to dismiss the amended bill for want of equity. The statutory Court which heard both motions, referred in its opinion to the previous opinions rendered by the District Judge and by the Circuit Court in this case, but stated that it appeared that the question involved had been settled by the later decision of this Court in the case of *Cudahy Packing Co.* v. *Hinkle,* 278 U. S., 460, on a statute deemed to be essentially like the one here involved. The statutory Court therefore awarded a temporary injunction and denied the motion to dismiss the bill, and upon appellant's election to stand by such motion, a final decree was entered for a permanent injunction, as prayed in the bill of complaint.

From this decree, appellant has appealed to this Court and has assigned errors in the granting of such decree for a temporary injunction as well as a permanent injunction and denying the motion of appellant to dismiss the bill for want of equity, on the grounds that the franchise tax assessed against appellee did not impose any unlawful burden on its interstate commerce, or deprive it of its property

without due process of law, or deny it the equal protection of the laws; and also, that the Court erred in holding in effect that Section 107 of the Illinois Corporation Act as applied to appellee, imposes an invalid tax under the decision referred to in the opinion, or under any of the decisions of this Court (R. 20-28).

All of the errors assigned are specified and relied upon by appellant for reversal. Appellant contends that the statute in the *Cudahy case* differs very materially from the nature and effect of the statute involved in the present case. The Illinois Corporation Act requires all corporations organized or admitted to do business in that State and making an annual report, to pay annually at least the minimum fees specified in Section 107 of said Act, as an excise or franchise tax for the right or privilege granted of doing business in that State during the next year. The tax is assessed in advance and it is assumed that the corporation will use a sufficient amount of its capital stock in the State to produce the minimum tax assessed at the rate specified in Section 105, or if not, that it should nevertheless pay such tax for the privileges granted to it by the State.

The position of appellant is that the State has the right to impose a reasonable minimum fee or tax in advance, for the privileges granted by it to a corporation to use its capital in carrying on a local business in the State during the next year, even though such privilege may not have been actually exercised to a substantial extent during the preceding year. The tax is imposed only as a minimum fee for the

privileges granted, which the corporation has a right to exercise if it shall desire to do so. If the corporation should exercise the privileges granted to a substantial extent, then it would be required to pay a higher tax for the exercise or use of such privileges, under the provisions of Section 105. Such a tax does not discriminate against any foreign or domestic corporation, but is applied uniformly to all corporations alike, under the same circumstances. It is a tax upon the privileges granted and does not effect property outside the of the State. It is not designed or intended to impose any burden on interstate commerce, and does not have that effect.

SUMMARY OF ARGUMENT.

I.

The Illinois Corporation Act fixes a reasonable minimum fee or tax for granting the privilege of doing a local business in that State as a corporation.

The provision of Section 105 of the statute for the payment of an annual license fee or franchise tax at the specified rate on the proportion of capital stock represented by property and business in the State, is subject to the further provision that such fee or tax shall not be less than the minimum fee fixed by Section 107, with a maximum limit in the amount of the tax, for the privilege granted of doing business in the State.

General Corporation Act, Ill. Rev. Stats., Chap. 32, Secs. 105, 107.

O'Gara Coal Co. v. *Emmerson,* 326 Ill., 18, 43-4 *(Colgate & Co.* and *Beatrice Creamery Co.)*

II.

The principle of a graduated fee or franchise tax with a reasonable maximum limit has been repeatedly approved by this Court.

The provisions of the Act which require all corporations organized or admitted to do business in Illinois to pay annually a minimum license fee or franchise tax, which is graduated to some extent upon the amount of issued capital

stock and is limited to the specified maximum amount of tax, fix a reasonable excise or franchise tax for the privileges granted and do not violate the Fourteenth Amendment to the Constitution.

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Cheney Bros. Co. v. *Massachusetts*, 246 U. S., 147, 154-8;

Kansas City Ry. Co. v. *Kansas*, 240 U. S., 227, 232-5;

Baltic Mining Co. v. *Massachusetts*, 231 U. S., 68, 82-7;

Tax Commissioners v. *Jackson*, 283 U. S., 527;

Metropolis Theatre Co. v. *Chicago*, 228 U. S., 61, 69.

III.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee.

The statute and the tax imposed in this case conform to the rule adopted by this Court that, while the State may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

Western Cartridge Co. v. *Emmerson*, 281 U. S., 511, 513;

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294;

Underwood Typewriter Co. v. *Chamberlain,* 254 U. S., 113, 120;

United States Glue Co. v. *Oak Creek,* 247 U. S., 321, 326;

Peck & Co. v. *Lowe,* 247 U. S., 165, 173-5;

Kansas City M. & B. R. R. Co. v. *Stiles,* 242 U. S., 111, 119;

Kansas City, etc., Ry. Co. v. *Kansas,* 240 U. S., 227, 234;

New York v. *Latrobe,* 279 U. S., 421;

International Shoe Co. v. *Shartel,* 279 U. S., 429.

IV.

The statutory Court apparently misconceived the nature and effect of the tax here assessed and misapplied the decision in the Cudahy case.

Opinion of Statutory Court, Record 24-25;

Cudahy Packing Co. v. *Hinkle,* 278 U. S., 460;

Postal Tel. Cable Co. v. *Adams,* 155 U. S., 688, 698.

V.

The District Court in its former opinion herein properly construed the statute and the nature of the tax assessed, under the decisions of this Court.

Opinion of District Court, 27 Fed. (2nd) 1005;

General Railway Signal Co. v. *Virginia,* 246 U. S., 500, 511;

Cheney Bros. Co. v. *Massachusetts,* 246 U. S., 147, 154;

Kansas City Ry. Co. v. *Kansas,* 240 U. S., 227, 232-5.

ARGUMENT.

I.

The Illinois Corporation Act fixes a reasonable minimum fee or tax for granting the privilege of doing a local business in that State as a corporation.

The bill of complaint in this case clearly shows that, pursuant to the last clause of Section 105 of the statute, the minimum franchise tax specified in Section 107 was assessed against appellee for the privilege of doing a local business in the State during the next year, inasmuch as appellee had not used a sufficient proportion of its capital stock in the State the preceding year to make it subject to a larger tax under the rate specified in Section 105.

The real question in this case is, whether or not the State may require a corporation organized or admitted to do business therein, to pay a minimum fee or franchise tax, as specified in said Sections 105 and 107, for granting it the privilege of doing business in the State during the next year, although it may not have actually exercised its franchise in the State the preceding year to a sufficient extent to produce such an amount of tax at the rate specified in Section 105.

Sections 105 and 107 of the Corporation Act should be considered and construed together. The effect of both sections is to require every corporation, which desires to main-

tain the right or privilege of transacting local business in the State, to pay at least the fee specified in Section 107, based within the specified limits on the amount of issued capital stock which it may use in the State. Furthermore, if the application of rate specified in Section 105 to the proportion of the capital stock actually represented by property and business in the State will produce a larger tax, then such larger tax must be paid, instead of the minimum fee. In such case, the fee is increased in direct proportion to the exercise of the privilege by the corporation.

The amount of issued capital stock of appellee in this case is $36,249,750. As its issued stock is in excess of $20,000,000, the minimum fee to be paid is $1000, which is the maximum amount provided by Section 107. A tax at the rate of five cents on each one hundred dollars, as specified in Section 105, would require the use of only $2,000,000 in the State to produce a tax amounting to $1000. The amount so required to be used is only about 5.5% of appellee's issued capital stock and only 2.2% of the total value of its property or assets. This required amount is much less than the $5,500,000 on which appellee has paid the initial or admission fees, and which it may therefore be expected to use in that State (R. 6).

It would seem to be reasonable for the State to require a corporation having a license to carry on business in the State to use at least this small proportion of its capital or assets in the State, when it has sought and been granted the privilege of doing so, or in any event, that it should pay a tax on such proportion at the rate specified, for maintaining

its rights in the state and exercising them as it desired. The state grants such privileges each year in advance and the corporation may exercise them by using as much of its capital in the State as may be convenient or desirable for it during the year.

The report of appellee showed that the property used by it in Illinois the preceding year was valued at $801,196.00 and that its local business in that State during such year amounted to 2,868.36. While this amount is comparatively small, such local property and business connections may add materially to appellee's total property and business. The total value of all its property was more than twice the amount of its issued capital stock, and its total business during the preceding year amounted to $18,201,955. It thus appeared that appellee had been exercising its franchise to some extent in Illinois during the preceding year, and such use might be increased if desired. In renewing or continuing its franchise, the State gave it the right to maintain its privileges and use such part of its capital in carrying on business in the State during the next year as it might desire, without the payment of any additional tax for such privileges.

II.

The principle of a graduated fee or franchise tax with a reasonable maximum limit has been repeatedly approved by this Court.

The principal of a franchise tax imposed upon a basis similar to that provided by Section 107 of this Act has been

upheld by this Court in several cases. In *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, a statute of Virginia imposed a franchise tax for authority to do business in the State, which was graduated to some extent upon the amount of authorized capital stock, the fee being $1,000 for all corporations having an authorized capital stock of $1,000,000 to $10,000,000. The corporation in that case had an authorized capital stock of $5,000,000 and was therefore required to pay a tax of $1,000 for the privilege of being allowed to perform contracts in the State which amounted to $85,597. The Court held that such a tax was not arbitrary or unreasonable and did not impose any burden upon interstate commerce.

In the case of *Kansas City, Ft. Scott & Memphis R. R. Co.* v. *Kansas*, 240 U. S., 227, the statute imposed a graduated franchise tax upon corporations, with a maximum limit of $2,500 on capital stock amounting to over $5,000,000. The Court again held that such a tax was reasonable and did not impose a burden upon interstate commerce, or violate the due process or equal protection provisions of the Fourteenth Amendment, although a large part of the property and business of that corporation was outside the State.

In the case of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68, the statute imposed a tax of 1/50 of 1% of the authorized capital stock of foreign corporations for the privilege of doing a local business in that State, with a maximum limit of $2,000 on a capital stock of $10,000,000 or

more. The Court held that in view of the limitation and conditions, such a tax was reasonable and did not necessarily burden interstate commerce or deny the equal protection of the laws to foreign corporations engaged in interstate commerce.

The Court again approved the Massachusetts statute in *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S., 147, in the case of a foreign corporation doing a local business in that State, and also engaged in interstate commerce. However, after the maximum limit of the tax was removed by that State, and the tax was computed on the entire authorized capital stock, the Court held the statute invalid in the case of *International Paper Co.* v. *Massachusetts,* 246 U. S., 135, on the ground that it thus imposed an unreasonable burden upon interstate commerce, and taxed property outside of the State.

The latter case followed the decision in *Looney* v. *Crane Co.,* 245 U. S., 178, in which the corporation had been admitted into the State in 1905, upon payment of a fee which was limited to $200 for a permit to do business for ten years, and thereafter paid an annual franchise tax until the permit was about to expire in 1915. During that time the maximum limit on the permit tax had been removed, thus increasing the tax to $17,040 on the entire authorized capital stock. The annual franchise tax was also computed on that basis, or on the issued stock, surplus and undivided profits, in case they exceeded the amount of authorized stock and the tax was thereby also greatly increased. The Court

held the statute invalid as to both the permit tax and the annual franchise tax, on the ground that it thus imposed a tax upon the entire authorized stock or capital of the corporation, without any limitation on the amount of the tax.

The Court in that case and also in the *International Paper Company* case expressly distinguished the other cases cited (*Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350; *Kansas City, Fort Scott & Memphis Ry. Co.*, v. *Kansas*, 240 U. S., 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S., 111). In those cases the Court approved statutes which contained provisions qualifying or restricting their operation and effect, such as the subject matter on which the tax was levied, or limitations on the amount of the tax, which restricted it to a reasonable maximum amount for the privilege granted, as in the present case. Those cases are directly applicable here and sustain the tax imposed in this case.

The principle of a graduated tax has been recently approved by this Court in *Tax Commissioners* v. *Jackson*, 283 U. S., 527, as applied to a number of so-called chain stores in the state of Indiana. The differences or advantages in the operation and management of a number of such stores, as compared with stores separately owned and operated, were held to justify a higher graduated tax, which was not arbitrary or unreasonable and did not violate the Fourteenth Amendment. So in the present case, the greater value of the privilege granted of using a large amount of

issued stock in the state may very well justify a higher graduated tax to a limited extent than the tax imposed for the privilege of using a small amount of stock in the state. Several other cases are referred to in the opinion in that case in which the same principle was applied, as in *Metropolis Theatre Co.* v. *Chicago,* 228 U. S., 61, in which license fees were based and graded on the admission fees charged by the theatres in that city.

III.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee.

This Court has frequently held that a franchise tax on corporations cannot be held to be repugnant to the commerce clause of the Constitution, merely because it is measured by the capital stock of such corporations. The rule applicable in such cases was clearly stated by the Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S., 290. The Court there upheld a franchise tax which was assessed under the Illinois statute against a foreign corporation, and which was computed upon the entire authorized capital stock, although more than nine-tenths of the business transacted was measured by sales made in interstate commerce. In considering the validity of the statute and the tax assessed, the Court said, at page 294:

> "While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only

> incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. * * *
>
> The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact distantly affect it."

This case was followed in the recent decision of this Court in *Western Cartridge Company* v. *Emmerson,* 281 U. S., 511, in which it appeared that more than five-sixths of the goods produced in that State were sold and shipped in interstate commerce, which were included in determining the amount of business transacted in that State. It was held that the inclusion of such business in computing the tax did not even indirectly burden interstate commerce, or indicate any intention on the part of the State to do so, and that if there was any burden at all, it was indirect and remote and did not violate the commerce clause.

This question was also fully considered in the case of *Kansas City Ry. Co.* v. *Kansas,* 240 U. S., 227, in which an annual graduated tax with a maximum limit was computed upon the issued capital stock of a railway corporation engaged in interstate commerce. After holding that the State would not be barred from imposing a tax upon the privilege granted, merely because the corporation is engaged in interstate as well as intrastate commerce, the Court said, at page 232-3:

> "And agreeably to the principle above mentioned, it has never been and cannot be maintained that an annual tax upon this privilege is in itself and in all cases, repugnant to the Federal power merely because it is measured by the authorized or paid up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority."

Likewise, in the case of *Kansas City M. & B. R. R. Co.* v. *Stiles,* 242 U. S., 111, in which a franchise tax was measured by the entire capital stock of a consolidated railroad company, it was urged that the statute was void because it taxed property outside the State and imposed a direct burden upon interstate commerce. After referring to the discussion of those questions in the above case and stating that it was there held that the State might measure a tax within its authority by capital stock which in part represented property beyond the taxing power of the State, the Court further said, at page 119:

> "So of the objection that the tax imposes a burden upon the interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City, etc., Railway Co.* v. *Kansas, supra,* is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character."

The same principle applies in the case of a franchise tax measured by the net profits of a corporation. In *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S., 113, an

annual franchise tax was imposed by the State of Connecticut upon a foreign corporation, under a formula which allocated 47 per cent of its profits to that State, although only a little over three per cent of such profits were made from sales in the state. It was contended that the tax burdened interstate commerce and business in other states. The Court held, however, that a tax measured by such profits was entirely valid, although derived in part or mainly from interstate commerce. The Court applied the same principle with respect to franchise taxes measured by net profits in the cases of *United States Glue Co.* v. *Oak Creek*, 247 U. S., 321, and *Peck & Co.* v. *Lowe*, 247 U. S., 165.

This Court has specifically upheld statutes very similar to that involved in the present case, even though in some cases, as in *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, and other cases, the tax was measured by the authorized instead of issued capital stock, with a maximum limit in the amount of the tax. The difference in the principle of a statute which measures a tax by authorized instead of issued stock, when applied to a corporation having a substantial amount of unissued stock, however, may well account for the contrary decision in the case of *Cudahy Packing Company* v. *Hinkle, supra.* The difference also in the basis and general application of the tax is that case from the very limit application and amount of the tax in the present case, would seem to be entirely sufficient to sustain the validity of the statute and the tax imposed in this case.

The application of the statute to appellee in the present case certainly cannot be considered as made for the pur-

pose or as having the effect of defeating Federal constitutional rights. Neither can the tax imposed affect interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of or restraint or burden on such commerce. The statute is clearly designed and intended to impose only a reasonable minimum charge upon all corporations, both foreign and domestic, for maintaining the privilege granted of doing a local business in the State during the next ensuing year, and of exercising such privilege to a limited extent if desired, without any additional charge for so doing. It seems clear that the statute, as so intended and as applied in this case, cannot be deemed to violate the commerce clause of the Federal Constitution, or any provision of the Fourteenth Amendment thereto.

IV.

The statutory Court apparently misapplied the decision in the Cudahy case to the statute involved in the present case.

It appears from the memorandum opinion herein that the statutory Court assumed that the decision of this Court in the *Cudahy case* involved a similar statute and was therefore controlling in the present case. We believe it can be demonstrated that the Washington statute and the facts involved in the *Cudahy case* were essentially different from the statute and situation here involved, and that consequently such decision is not directly applicable or controling in this case.

In the *Cudahy case,* the statute required the tax to be computed upon the entire authorized capital stock, regardless of the fact that less than two-thirds of such stock had been issued. Under the Illinois statute, only the issued stock is considered in determining the minimum fee which should be assessed for the privilege granted by the State.

The total value of the property owned by the corporation in the *Cudahy case* did not exceed the amount of its issued stock. The authorized but unissued stock did not represent any property or business of the company and afforded no basis for the computation of the tax. In the present case, the property alone amounts to more than twice the value of the issued stock which was considered to a limited extent in determining the minimum fee to be assessed for the privileges granted by the State.

The State in the *Cudahy case* imposed an additional permit or admission fee on account of an increase in the amount of authorized stock, as well as an annual franchise tax computed upon the entire amount of authorized capital stock, without regard to the amount issued or used in the State. The present case involves only an annual franchise tax, which is limited to a low maximum amount, and would require the use of less than half of the amount of stock on which an admission fee was previously paid to produce the tax assessed.

The Washington statute also differed radically from the statute here involved, in that the tax there was com-

puted solely on a graduated amount of authorized capital stock, without any minimum fee or increase in proportion to the amount used in that state. The statute thus failed to make any distinction between corporations using little or no capital stock in the state, and those which used a large part or all of their capital in that state. It therefore appeared that no consideration was given to the difference between the value of the right to use the privilege granted, and the value of such privilege when largely or fully exercised by the corporation.

In the present case, the statute provides primarily for the payment of an annual license fee or franchise tax for the next year, to be computed at the specified rate upon the proportion of issued capital stock used in the state in the preceding year. However, if the corporation has used a very small part or none of its capital in the state the preceding year, it is apparent that an adequate tax cannot be assessed on that basis for granting or continuing its privileges for the next year. The statute therefore provides that in such cases a comparatively small minimum fee or tax shall be imposed for the privileges granted for the next year, which is graded to some extent upon the amount of issued stock which may be used in the state, with a low maximum limit on the amount of tax which may be imposed.

These essential and substantial differences in the basis and extent of the tax as imposed in this case clearly distinguish it from the *Cudahy case* and afford proper grounds for a different conclusion in this case. The tax here imposed

is strictly a franchise tax for the privilege granted of doing a local business as a corporation in the state. The amount provided is very reasonable in proportion to the issued capital stock in the several gradations which may be used, and likewise is limited to a comparatively small maximum amount. If such a reasonable excise or franchise tax may not be imposed for the privilege granted, then a foreign corporation may be admitted to do business in this state upon the payment of a trifling amount in the first instance, and may thereafter maintain the right or privilege of doing business in the state from year to year perpetually without any further payment, regardless of the value of the privileges granted by the state and received by the corporation.

In this case, appellee admittedly carried on a local business in Illinois and had a substantial amount of its property within the state. Furthermore, it had the privilege of increasing the amount of its property and business in that state during the next year without paying any additional tax, until the application of the rate specified in Section 105 would produce an amount in excess of the minimum tax provided by Section 107 of the Act. The fee charged was an excise or franchise tax for the privilege granted, and was not a tax on property outside the state. There is a reasonable relation between the charge and the privilege granted, which applied to all corporations alike under the same circumstances, and did not discriminate against the appellee in this case. It therefore appears that

neither the statute or the tax assessed would violate the equal protection or due process clause of the Fourteenth Amendment.

The statutory Court in deciding this case appears to have applied general rules which were applicable to the *Cudahy case,* but failed to distinguish the different characteristics of the statute in this case. That Court therefore appears to have overlooked the doctrine stated by this Court with respect to the exercise of the taxing power by a state, in the case of *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S., 688, 698: "The substance and not the shadow determines the validity of the exercise of the power." It seems clear that a consideration of the substance of the statute as applied in this case will disclose that it was a valid exercise of the taxing power of the State.

V.

The District Court in its former decision correctly construed the Statute and applied it to the situation in this case.

The memorandum of views of the District Court in the former decision in this case clearly sets forth the nature and purpose of the tax imposed under Section 107 of this Act, and distinguished it from a tax computed at the rate specified in Section 105. After stating the contentions of appellee and setting forth the provisions of the two sections of the statute, the District Judge said in his opinion, as reported in 27 Fed. (2nd) 1005:

> The two statutes here involved attempt to tax two entirely different things. Section 107 is clearly 'a franchise tax', while Section 105 provided a tax upon 'the exercise of the franchise' and does not become operative until the business done and property used in the exercise of the franchise, measured by the standards provided in Section 105, produce an amount equal to or greater than the amount of the mere franchise tax provided in Section 107. When that point is reached in the exercise of the franchise, then Section 107 ceases to be operative and Section 105 control the amount."

The Court in that opinion also clearly distinguished the *International Paper Company case* and like cases there referred to and followed, including the *Crane Company* case, and showed that the present case comes directly within the principles applied in the *General Railway Signal Company* case. After referring to the privileges granted to appellee by the State, for which the tax was imposed, and replying to its contentions in regard to the tax, the Court also referred to the comment on the status of the *Signal Company* case, and quoted the conclusion of Mr. Justice McReynolds in the opinion rendered by him in that case, as follows:

> "Considering what we said in (citing a number of decisions of the Court) the two characteristics of the statute just referred to must be regarded as sufficient to save its validity."

And the District Court added in its opinion herein:

> "The two characteristics referred to by Mr. Justice McReynolds are: (1) That the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed: (2) in the class to which plaintiff in error belongs the amount specified is $1,000 and 'under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.' "

> "So, in this case, we conclude that the case made out by plaintiff's bill may also be along the border line, but the taxing statutes here involved, possessing the two characteristics referred to in the *General Railway Signal Co. case, supra,* must be regarded as sufficient to save their validity."

The statute here involved is more reasonable and closely related to the privilege granted than any similar statute heretofore considered by the Court in any case, in that it provides the issued capital stock instead of authorized stock as the measure of the tax on a restricted scale, and also fixes a very low maximum limit in the tax for the privilege of using the amount of stock to which it applies. In the present case, the tax amounts to only $1 for each $36,249.75 of the issued capital stock, and in no case could the maximum tax amount to more than $1 for each $20,000 of such stock. The imposition of such a small franchise tax for the valuable privilege granted and actually exercised by appellee in this case is not only reasonable but could not burden interstate commerce or tax property outside of the State.

The fact that appellee actually has some property and is transacting some business in the State does not affect the right of the State to impose the minimum tax against it, as provided by Section 105 and 107. Appellee is required to pay no more than other corporations with a like amount of capital stock, but which merely maintain their right to do business in the State, and therefore it cannot complain on that ground. The contention urged by appellee would

clearly discriminate against such other corporations and in favor of corporations actually having a comparatively small amount of property and business in the State. Such a construction would necessarily invalidate Section 107 and leave the State without any power to impose any franchise tax for granting the privilege to corporations to do business in the State from year to year.

The privilege granted by the State to a foreign corporation to transact a local business with its property is a valuable privilege, even though it may not be immediately exercised to any great extent. The value of the franchise necessarily bears a most legitimate relation to the amount of capital stock which may be used in the exercise of the franchise. The grant of such a privilege to the corporation gives it the right to use as much of its capital stock as it may see fit in carrying on its business in the State. This clearly affords a valid basis for imposing a franchise tax on such a corporation, measured to some extent by the capital stock which may be used, with a reasonable limit in the maximum amount of tax which may be imposed for the privilege granted.

For the foregoing reasons, it is respectfully urged that the statute as applied in this case does not violate any provision of the Federal Constitution or the Fourteenth Amendment thereto, as alleged in the bill of complaint, and that therefore the decree of the statutory Court in this case

should be reversed and that the cause should be remanded to the District Court with directions to dismiss the bill of complaint.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 178

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM STATUTORY DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT.

I.

The Statute and Nature of the Tax.

The statement of appellee refers to the allegation in its bill that it has paid admission fees on $5,500,000 of its capital stock in Illinois, and has actually used $1,533,324.43 of its issued stock in that State. Appellee has the right to use all of its capital stock on which it has paid admission

fees in Illinois, without the payment of any additional fee, and it certainly seems reasonable to assume that it intends to do so.

Appellee refers to the decision in *O'Gara Coal Co.* v. *Emmerson,* 326 Ill., 18, holding certain provisions of the Illinois Corporation Act of 1919 invalid. The only part held invalid was the provision for computing franchise fees and taxes on authorized capital stock, where a part of such stock was unissued, and the valuation of no par value stock for such purpose at $100 per share, which has since been upheld by this Court in *International Shoe Co.* v. *Shartel,* 279 U. S. 429. The decision of the Illinois Supreme Court did not effect the right of appellee and other foreign corporations to use the amount of authorized capital stock in that State on which admission fees had been paid.

Appellee is in error in stating that appellant endeavors to treat the minimum fee assessed against it as an initial or admission fee. The fee here assessed is not a franchise tax or excise upon the privilege of being admitted to do business in Illinois, but is an annual fee assessed for the privileges granted of carrying on business in the State as a corporation during the next succeeding year after the fee was assessed.

Appellee refers to various sections of the Illinois Corporation Act with respect to initial or admission fees, annual reports and methods of computing other taxes, which have little or no application to the question involved in the

present case. Neither is there any question here as to any claim for a refund of any franchise fee or tax which may have been voluntarily paid. It may be noted, however, that appellee has paid at least the amount of the annual fee assessed in this case for many years, but now raises the objection for the first time that this minimum annual fee should not be assessed against it, as provided by the statute.

It should be noted also that the minimum fee is a charge made in advance for the privilege granted of carrying on business in the State during the next year, and is not computed or dependent upon the extent to which such privilege may be exercised during such year. This minimum fee or charge is made against all corporations alike under the same circumstances, for the privileges granted by the State to such corporations.

In beginning its argument, appellee takes the position that the admission fees paid by it purchased the privilege of doing business in Illinois for a period of eighty-eight years, and that therefore no additional fee can be charged for the privilege of doing a corporate business in that State. This is a confusion of the fee charged for admission into the State with the annual fee or tax assessed for the privilege of doing business in the State. Section 80 of the Act requires a foreign corporation, before transacting any business in the State, to procure a certificate of authority therefor, for which it is required to pay an admission fee in the same amount as that paid by like corporations organized in the State (Appellee's Appendix, p. 39).

Section 101 of the statute also provides that all such fees shall be paid "in addition to the annual franchise fees and taxes hereinafter provided." Section 105 provides for an annual franchise tax to be computed upon the proportion of capital stock used in the State the preceding year. However, if the corporation has not used a substantial part of its capital stock in the State the preceding year, it is required by the last clause of Section 105 to pay at least the minimum fee specified in Section 107. This fee is charged for the privileges granted by the State for the next ensuing year, and applies to all corporations alike, both domestic and foreign, under the same or similar circumstances.

The statement of the question involved in this case on page 12 of appellant's brief, is quoted and then restated in varied form by appellee on page 20 of its argument. The first question restated omits the essential conditions that the prescribed fees do not vary in direct proportion to the issued capital stock, and that a reasonable maximum limit upon the tax is fixed, which is directly applicable and is to the advantage of appellee in this case.

The second question stated by appellee ignores the essential difference in the provision for the payment of a minimum fee for the privileges granted by the State, and the fee imposed or computed upon the substantial exercise of the privilege by the corporation. This question also ignores the fact that the statute applies alike to corporations, either foreign or domestic, having a like amount of

capital stock, within the graduated limits fixed in the amount of stock which they may have and use to such extent as they see fit in the State.

The third question presented by appellee, like the first question, ignores the two essential conditions or restrictions of the statute, which distinguish it from general and unlimited provisions and save its validity, as held by this Court in similar cases. This statute merely requires every corporation proposing to carry on local business in the State to pay at least a limited minimum fee for the privilege granted of using its capital stock in the State the next year, which it may exercise to such extent as it sees fit during the year.

II.

The Fee or Tax Imposed does not Burden Interstate Commerce or Violate the Due Process Clause.

Appellee asserts its faith in the decision of the lower Court, and insists that the case of *Cudahy Packing Company* v. *Hinkle,* 278 U. S., 460, controls this case, but disregards the essential differences between the statute involved in that case and the provisions of the statute in question here.

Appellee correctly states the general theory or basis of the franchise tax provisions of the Illinois statute, as applied to corporations using a substantial proportion of their capital stock in that state. The difficulty with appellee

is that it used such a small proportion of its qualified stock in that state the preceding year that it became subject to the minimum fee provided by the statute for the privileges granted by the state for the next year. This provision does not impose an additional tax, as stated by appellee, but only requires the minimum fee to be paid in such cases.

The case of *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, referred to by appellees, is not in point here. The statute involved in that case imposed a tax computed upon the entire authorized capital stock of foreign corporations, without any restriction or limitation either in the amount of stock or in the amount of the tax imposed. Similar statutes were involved in the other *Western Union* and (*Pullman* cases, cited, and those cases are therefore) not applicable here.

Appellant is not relying strongly here upon the *Baltic Mining Co.* and *Cheney Bros.* cases, as stated by appellee, for the reason that the tax under the Massachusetts statute there involved was not limited in any way, as applied to corporations having capital stock of less than $10,000,000, but nevertheless, the statute was held valid in those cases.

In the cases of *Kansas City, etc. R. R. Co.* v. *Kansas*, 240 U. S., 27, and *Kansas City M. & B. R. R. Co.* v. *Stiles*, 242 U. S., 111, the tax was properly graded and limited to a reasonable amount for the privileges granted. This Court sustained the validity of the statutes involved in those cases, although the railroad corporation in each case was engaged in interstate commerce and had a large amount

of property and business in each state. No distinction was made as between foreign and domestic corporations in those cases.

The case of *Looney* v. *Crane Co.*, 245 U. S., 178, like the *Western Union* cases, involve a statute which imposed both the renewal of a permit or admission tax and an annual franchise tax upon the entire authorized capital stock, or capital, surplus and undivided profits of a foreign corporation previously admitted and doing business in the state. Neither tax was graduated or limited in any respect whatever, but was applied without any restriction or limit to the entire authorized stock or capital of the corporation. That statute was therefore essentially different from those in prior cases distinguished by the Court, which rested upon particular provisions or limitations which saved their validity, as stated by the Court.

This difference between the two classes of cases was further illustrated in the case of *International Paper Co.* v. *Mass.*, 245 U. S., 135, after the maximum limit in the tax was removed by an amendment to the statute, which changed it to the same class as the *Western Union* and *Crane* cases and rendered it invalid.

The *Ozark Pipe Line* and *Alpha Portland Cement Company* cases do not appear to be at all in point, for the reason that those corporations were not carrying on any local business in the state or authorized to do so, but were only engaged in interstate commerce in the respective states which

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IN THE

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No. 178

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE.

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REPLY BRIEF OF APPELLANT.

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The assumption of appellee that it could not use the required amount of stock in the state to produce the tax assessed, on account of the provisions of the Transportation Act or the Illinois Commerce Act, is not supported or justified by the record. Appellee has admittedly used a much larger amount of its stock in the state and no reason is shown why it may not do so again by increasing the amount of its property and local business in the state to such extent as it may see fit, under the privileges granted to it by the state.

Appellee seeks to distinguish *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, on the ground that the tax there was an admission fee, although it was actually assessed for the privilege of doing business in the state. Such a tax is no different in principle from the tax here assessed for the privilege granted of carrying on business in the state during the next year.

The distinction made by this Court in the *Hanover Insurance Co.* and *Latrobe* cases, cited by appellee has no application here. In the former case there was a discrimination against foreign corporations in assessing an annual franchise tax, while in the latter case the tax was in reality a franchise tax for the privilege of doing business in the state, like the *Signal Co.* case, and was likewise held to be valid.

III.

The Statute as Applied to Appellee does not Discriminate Against it or Violate the Equal Protection Clause.

Appellee asserts that the statute discriminates against it as compared with other corporations which pay franchise taxes measured by the proportion of the capital stock used in the state. The fact is, however, that such corporations pay a higher tax on that basis that they would be required to pay under the minimum fee provisions of the statute, and therefore any possible discrimination would be against them and in favor or appellee.

Appellee also refers to the proportion of issued capital stock which it says has been admitted and used in Illinois, but overlooks the fact that it has paid admission fees on $5,500,000 of its capital stock in that state. Therefore, it clearly had the right to use that amount of stock in the state during the next year, without the payment of any additional fees, even though it used a much less amount in the state the preceding year. Appellee also had the right to qualify and use a greater amount of its capital stock for use in the state, whenever it desired to do so.

Although not denying that the amount of issued stock which may be used bears a "fair relation" to the value of the annual franchise to do business in the state, appellee says that nevertheless the ratio of property owned and business done bears "a more true relation" to the value of the franchise. Appellee therefore concludes that the state discriminates against it because it has exercised its fran-

chise during the last year to a less extent than some other corporations have done, and which would therefore have to pay a higher tax in proportion for such use.

When appellee in effect admits that the franchise tax imposed upon it may bear a fair relation to the value of the privilege granted to it by the state, it concedes that the tax was imposed on a valid basis. It is immaterial that appellee may believe that some other basis for computing a tax bears a more true relation to the value of the privileges granted or exercised. The state is not required to select a method which may be deemed by corporations to be the most reasonable and fair basis for computing taxes imposed upon them. It is only required to select a method which bears some relation to the value of the privileges granted and such a statute is not arbitrary or invalid, as held by this Court in *New York* v. *Latrobe*, 279 U. S., 421, 427.

The contention that the statute is discriminatory because it provides two methods for imposing a franchise tax, merely confuses the minimum fee for the privileges granted with the larger tax which may be imposed upon the substantial exercise of the privilege by corporations. These provisions are applicable respectively under different conditions and apply equally in all cases under like circumstances, without any discrimination for or against any corporation to which such provisions are applicable.

The difficulty with appellee is that it considers this tax essentially as a property tax, or a tax according to the

value of its property and business in the state, and not as an excise or franchise tax on the privilege granted of doing business in the state as a corporation during the next year. For that reason, it insists that the tax should be computed only on the part of its capital actually employed in the state, without any regard to the amount of capital which it may use, or the value of the privilege granted to it by the state. The value of the privilege granted has a direct relation to the amount of its capital which may be used in the state and which may therefore be considered to a reasonable extent in fixing the amount of tax to be paid for such privilege.

It is urged by appellee that the statute discriminates against it because a corporation with a small amount of capital stock, of which all or a much greater proportion is used in the State, would pay a less amount of tax than that assessed against appellee. Such a corporation in fact would pay a larger tax than appellee in proportion to its capital stock which may be used by it in the State, but the payment of such larger tax by it affords no ground for a claim of discrimination against appellee. It has had $5-500,000 of its capital stock qualified for use in the State, and admits that would have to use only $2,000,000 of such stock in the State to produce a tax of $1,000 at the rate specified in Section 105.

The State does not require corporations having a large amount of capital to bring more of their property and business into the State than small corporations, but only re-

quires them to pay a reasonably limited fee or tax for the privilege granted of carrying on local business in the State. The amount of property and business which a corporation may have in the State does not determine the amount of the fee or tax assessed in any case, but only the issued stock which has been used or may be used is considered in determining the value of the privileges granted by the State or exercised by the corporation.

The quotation by appellee from the opinion in the *Airway case* supports the position of appellant here. The court there disclaimed holding that the charge made must be measured by the value of the privilege for which it is imposed, but stated that some relation to such value is a reasonable requirement. It seems clear that such a relation exists between the fee charged and the privilege granted in the present case, and therefore the statute is not arbitrary or unreasonable.

It is also said by appellee that the tax is not limited to the part of the capital stock apportioned to the taxing state, referring to the *International Shoe Company case.* The tax in that case was imposed on the basis of the general provisions of the statute here involved. If the general rate was applied to the proportion of capital stock of appellee admitted and qualified for use in the State, it would produce nearly three times the amount of the minimum fee assessed against appellee. It thus appears that appellee is favored by charging only the minimum fee for the privileges granted to it, rather than assessing a tax at the usual rate upon the proportion of its stock which it proposed to use in the State.

The provisions of the statute here involved apply equally and without discrimination to all corporations alike under the same circumstances. The tax assessed is closely related to the privileges granted by the State and is very reasonable in amount. The statute therefore does not deny the equal protection of the laws to appellee or any other corporation.

For the reasons set forth in appellant's original brief and herein referred to again, it is most respectfully but earnestly urged that the decision of the lower court was erroneous and should be reversed and that the cause should be remanded with directions to set aside the decree granted and dismiss the bill of complaint for want of equity.

Respectfully submitted,

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Counsel for Appellant.

BAYARD LACEY CATRON,
Assistant Attorney General,
Of Counsel for Appellant.

No. 178

ADDITIONAL POINTS AND AUTHORITIES.

The following points and authorities are to be added to the Supplemental Brief of Appellant on Federal and Equity Jurisdiction, on page 5 after point III (a):

(b). The appellee had a plain, adequate and complete remedy at law, if payment of the tax assessed had been made under protest and under compulsion of threatened penalties and forfeiture of rights, by an action at law against the collecting officer to recover the amount so paid.

Yates v. *Royal Ins. Co.*, 200 Ill., 202;

City of Chicago v. *Mutual Ins. Co.*, 218 Ill., 40, 44.

Highway Comrs. v. *Bloomington*, 253 Ill., 164, 176;

School of Domestic Arts v. *Harding*, 331 Ill., 330;

(c). The Illinois statute indicates the method by which a tax paid involuntarily under protest may be withheld from the State Treasury until a suit to recover such payment has been terminated, by providing as follows:

> "It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this Act by section 1 hereof to hold for thirty days all moneys received for or on behalf of the State under protest and on the expiration of such period to de-

posit the same with the State Treasurer, unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the court."

Smith-Hurd's Ill. Rev. Stats., 1931, Chap. 127, par. 172, Sec. 2a;

Cahill's Ill. Rev. Stats., 1931, Chap. 127b, par. 35, Sec. 2a;

Ward & Co. v. *Stratton,* 342 Ill., 472, 476-8;

Interstate Iron & Steel Co. v. *Stratton,* 340 Ill., 422;

O'Gara Coal Co. v. *Emmerson,* 326 Ill., 18;

Illinois Iron & Bolt Co. v. *Emmerson,* 333 Ill., 351;

Western Cartridge Co. v. *Emmerson,* 335 Ill., 150; 281 U. S., 511.

(d) The statute does not provide a new or exclusive remedy, as a temporary injunction could have been obtained prior to this statute, in order to hold a tax paid under protest and duress in a suit brought to recover the amount paid.

German All. Ins. Co. v. *VanCleave,* 191 Ill., 410;

American Can Co. v. *Emmerson,* 288 Ill., 289;

Armstrong v. *Emmerson,* 300 Ill., 54;

C. & E. I. Ry. Co. v. *Miller,* 309 Ill., 259;

C. & E. I. Ry. Co. v. *Emmerson,* 327 Ill., 574.

(e). The Statute does not dispense with the rule that the tax must be paid under duress or compulsion, in

sought to impose a franchise tax upon them. Consequently, there was no legitimate basis for such a tax, as stated by the Court in the latter case. Appellee has misconceived their application to the present case.

The case of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S., 71, involved the computation of a franchise tax upon a large amount of authorized capital stock, only about one-eighth of which had been issued. It therefore had no application to the present case, in which only a reasonably limited portion of the issued stock has been considered in determining the minimum fee to be paid. The tax here has no relation to unissued stock, but relates only to the issued stock which the corporation is given the privilege of using in this state.

Appellee relies principally upon the case of *Cudahy Packing Co.* v. *Hinkle*, 278 U. S., 460. That case has been discussed and distinguished from the present case on several grounds in appellant's brief, at pp. 25-26, which need not be repeated here. The two statutes proceed generally upon an entirely different theory and a different basis. The Washington statute invariably imposed a tax upon the authorized capital stock, without any regard to the amount issued or actually used in the state. As held in that case, the statute had no legitimate basis, and the tax so imposed was invalid, regardless of the amount.

The primary purpose of the Illinois statute is to measure a tax by the proportion of the capital stock used in the

state. The tax is computed on that basis in all cases in which the substantial proportion of the stock is used in the state. The minimum fee is assessed for the privileges granted by the state only in cases where such privileges may not have been exercised in the preceding year to a sufficient extent to provide a basis for computing a reasonable fee for the privileges granted by the state for the next succeeding year.

The minimum fee is reasonably and fairly graded and is limited to a very reasonable maximum amount. Such limitations and the restricted application of the statute to cases where the general provisions are inadequate clearly distinguish this case from the *Cudahy* case and bring it within the exceptions to the general rule, as stated by the Court in the *Crane Company* case.

There is no distinction in substance between the interstate commerce of appellee and the Cudahy Company, except that a large part of the business of that company in the taxing state was interstate commerce, while in the present case the amount of interstate commerce in the state is not shown or considered in any way. The Cudahy Company was also required to pay an additional admission or entrance fee upon the increase of its authorized capital stock, although not issued. No such fee is involved here, as appellee has previously paid admission fees on a much larger amount of stock than it would be required to use in the state in order to produce a greater tax than the minimum fee assessed in this case.

order that it may be recovered in an action or suit brought for that purpose.

Richardson Lubricating Co. v. *Kinney,* 337 Ill., 122;

Standard Oil Co. v. *Bollinger,* 337 Ill., 353;

Agni Motor Fuel Co. v. *Kinney,* 340 Ill., 17;

Roxana Petroleum Corporation v. *Bollinger,* U. S. C. C. A., No. 4578, October Term, 1931. (Certified copy of opinion herewith.)

It will be noted that in each of the above cases, the Court held that payment of the tax was made voluntarily, and not through fear of any penalty under the Illinois Motor Fuel Tax Act. It may also be observed that the penalties provided by said Act were not necessarily self-executing, as failure to pay the tax did not result in forfeiture of the right to do business or invalidate contracts, or automatically cause penalties to be added, but permitted the taxpayer to protect himself without making payment of the tax.

On the other hand, the provisions of the Illinois Corporation Act for enforcing payment of franchise taxes assessed under that Act, have been considered to be self-executing and sufficient to constitute duress, if payment of the tax imposed was made under protest and in fear of the enforcement of such provisions, and therefore recovery of an illegal tax so paid has been invariably al-

lowed, as shown by the cases above cited under point (c), which were brought for the recovery of such taxes.

Whenever suit has been brought to recover an alleged illegal tax involuntarily paid under protest, pursuant to the statute, the Illinois courts have invariably granted a temporary injunction to restrain the deposit of such payment until the final order or decree is rendered; and in case of appeal from a decree dismissing a suit, such temporary injunction is continued in force pending the determination of the appeal, pursuant to statutory authority, as shown in the cases above cited.

Cahill's Ill. Rev. Stats., 1931, Chap. 69, par. 21.

This statute does not in any way supersede the right of a taxpayer to recover an illegal tax involuntarily paid under protest in an action at law, or confer any jurisdiction in equity upon the Federal Courts, but merely indicates a convenient method of procedure in the State courts for the recovery of the tax paid.

Henrietta Mills v. *Rutherford County*, 281 U. S., 121, 127-8.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 178

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM STATUTORY DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

SUPPLEMENTAL BRIEF OF APPELLANT ON FEDERAL AND EQUITY JURISDICTION

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(71345—75)

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$3000, exclusive of interest and costs, the suit being of a civil nature in equity, under supervision 1 (a), Section 4 of the Judicial Code; and also, under subdivision 14 of Section 4 of the Judicial Code (R. 4). Section 4 of the Judicial Code does not appear to be applicable, but apparently it was intended to refer to Section 24 of the Judicial Code, which contains the provisions mentioned.

In support of its statement as to the amount, appellee alleged the suit involved its right and authority to do business in Illinois, and that the value of such right exceeds $3,000, in that appellant sought to require it to pay a franchise tax in the sum of $1,000, together with a penalty of 5% per month after August 1, 1927, and that the value of such business and penalties would exceed the sum of $3,000, and that to revoke its authority to do business in Illinois would damage it in the sum of $5,000 or more. (R. 10-11.)

The bill does not state any facts in regard to the local business of appellee in Illinois, except that such business during the preceding year amounted to the sum of $2868.36 (R.6-7). Nothing is shown as to future local business, or as to any interference with such business in that State.

No question has been raised as to the right of appellee to transact a local business in Illinois, or with respect to its right to carry on interstate commerce in that State. The sole question is in regard to the amount of the annual franchise tax which should be paid by it for the privilege of doing a local business in the State for the year commencing July 1, 1927.

BRIEF OF ARGUMENT.

I.

The bill fails to show that the District Court had jurisdiction of the amount involved in this case.

(a). The amount in controversy in this case is the difference between the sum of $1,000 assessed as a franchise tax against appellant, and the sum of $135.21 admitted by it to be due. Such difference in amount is not sufficient to give jurisdiction to the District Court.

Bill of Complaint, Record 3-13;
Judicial Code, Sec. 24, Subdivision 1.

(b). A suit to restrain the collection of a tax which does not exceed the statutory limit, is not within the jurisdiction of the District Court, and future taxes which may be assessed cannot be considered in determining the amount in dispute in such a case.

Holt v. *Indiana Mfg. Co.*, 176 U. S., 68;
Citizens Bank v. *Cannon*, 164 U. S., 319;
Bank of Arizona v. *Howe*, 293 Fed., 600.

(c). In a suit to enjoin the collection of a tax, the amount in controversy is the amount of the tax involved.

Turner v. *Jackson Lumber Co.*, 159 Fed., 923, 926;
Purnell v. *Page*, 128 Fed., 496;
Eachus v. *Hartwell*, 112 Fed., 564;
Lineham Ry. Tr. Co. v. *Tendergrass*, 70 Fed., 1.

(d). The alleged penalties and damage which might result by reason of the failure of appellee to pay the tax assessed are not involved in the controversy with respect to the amount of tax which should be paid, and therefore cannot be considered in determining the question of jurisdiction.

General Corporation Act, Smith-Hurd's Ill. Rev. Stats, Chap. 32, Secs. 110-128;

New England Mtg. Co. v. *Gay*, 145 U. S. 123;

Clay Center v. *Farmers Loan Co.*, 145 U. S. 224.

(e). The right of appellee to do business in Illinois is not in controversy in this case, and there is no question as to its right to carry on interstate commerce in that State. The value of such business or of its property in the State is therefore not involved in this suit.

Bill of Complaint, Record 3-13.

II.

This suit does not involve any right, privilege or immunity secured by the Federal Constitution.

Neither the statute nor the tax imposed would deprive appellee of any right, privilege or immunity secured by the Federal Constitution, which might be invoked as a ground for jurisdiction of the District Court.

Bill of Complaint, Record 3-13.

Holt v. *Indiana Mfg. Co.*, 176 U. S. 68, 72.

III.

The District Court does not appear to have jurisdiction in this case as a court of equity.

(a). The jurisdiction of the District Court in equity is limited to the protection of property rights, where there is no adequate remedy at law.

Bill of Complaint, Record 3-13;
Judicial Code, Section 24, Subdivision 1;
Walton v. *House of Representatives,* 265 U. S., 487;
White v. *Berry,* 171 U. S., 366;
Taylor v. *Beckham,* 178 U. S., 548.

ARGUMENT.

I.

The amount involved in this case was not sufficient to confer jurisdiction on the District Court.

The amount involved in this case is the difference between the tax assessed and the sum admitted by appellee to be due, which difference amounted to the sum of $864.79. The amount therefore did not exceed the sum of $3,000 required to confer jurisdiction on the District Court.

This Court held in the case of *Holt* v. *Indiana Mfg. Co.*, 176 U. S., 68, that a suit to restrain the collection of a tax, which does not exceed the statutory limit, though arising under the Constitution or laws of the United States, is not within the jurisdiction of a Federal Court. The Court also held that future taxes which may be assessed cannot be included in determining the amount in dispute.

In the case of *Citizens Bank* v. *Cannon*, 164 U. S., 319, this Court also held that under a bill to enjoin the collection of taxes for a series of years, where the evidence shows only the amount of the assessment for one year, which was below the jurisdictional amount, it could not be assumed that the assessment for each of the other years was for a like amount, in order to confer jurisdiction on a Federal Court. Those decisions are directly applicable to the present case.

In conformity with these decisions, the lower Federal Courts have frequently held that in a suit to enjoin the collection of a tax, the amount in controversy is the amount of the tax in question. The penalties or damages which may accrue by reason of a failure to pay the tax, like costs and interest on the amount involved, cannot be considered in determining the amount in controversy. (Brief I, (c).)

The bill shows that there is a controversy only as to the amount of the tax which may be lawfully assessed. The penalties which may accrue are only incidental to the failure to pay the tax assessed and might have been avoided by the payment of such tax, the same as interest and costs which might accrue upon an amount in dispute.

The bill fails to show that there is any question as to the right or authority of appellee to do a local business in Illinois, or to carry on interstate commerce in that state. On the contrary, it clearly appears from the bill that no such rights were involved, but that only the amount of the tax which may be legally assessed is in dispute.

The authorities cited by appellee to sustain the jurisdiction are therefore not in point. The decisions cited are all cases in which the right to do business was involved or there was a direct interference with such business, either local or interstate, and that the amount of such business or value of rights involved exceeded the sum of $3,000.

The case of *First National Bank of Columbus* v. *Louisiana Highway Commission,* 264 U. S., 308, referred to

by appellee, holds contrary to its contention on this point. The Court there stated, at page 310, that the mere assertion that more than the required amount is involved is not enough, where, as in that case, the facts alleged do not even tend to support the claim. This statement is directly applicable to the facts stated by the bill in the present case.

The only case cited by appellee in which the question of a tax was involved which was less than the amount required, is *Berryman* v. *Whitman College,* 222 U. S., 334. The Court sustained the jurisdiction in that case, however, on the ground that the imposition of the tax impaired the obligation of a legislative contract with the college, and thus distinguished it from cases in which no such rights were involved, such as the present case.

If the argument of appellee should prevail, then every franchise tax or any other kind of tax, no matter how small in amount, which might be assessed or levied with respect to property or business exceeding the value of $3,000, would be sufficient to confer jurisdiction on the District Courts. In that view, the Federal Courts, including this Court, would be required to take cognizance of all such cases, no matter how trivial in amount the tax involved might be, contrary to the purpose and intent of Congress in limiting the jurisdiction of the District Courts to cases in which the amount in controversy exceeds $3,000.

II.

This suit does not involve any right, privilege or immunity secured by the Federal Constitution.

The bill also sought to give jurisdiction to the District Court by alleging that the suit was brought to redress the deprivation of rights, privileges and immunities secured to appellee by the Federal Constitution.

As stated by this Court in *Holt* v. *Indiana Mfg. Co.*, 176 U. S., 68, at page 72, this provision refers to civil rights only, and was therefore not applicable to the tax assessed in that case. So in the present case, the tax here assessed does not involve any civil rights of a personal character, and therefore the constitutional provision referred to is not applicable.

Appellee has not discussed this provision in the brief presented by it in support of the jurisdiction, and therefore appears to have abandoned it as a ground for jurisdiction of the District Court in this case.

III.

The District Court does not appear to have jurisdiction in this case as a court of equity.

The jurisdiction of the District Court in equity is limited to the protection of property rights, where there is no adequate remedy at law. If an action at law had been brought against appellee to collect the tax, it might have defended on the ground that the statute was invalid, and if successful would have been relieved from payment of the tax assessed.

It does not appear from the bill that any action was taken against appellee for the purpose of forfeiting its right to do business in the State, either local or interstate, or to enforce any penalty whatever. The situation does not seem to have required the District Court to assume jurisdiction of the suit as a court of equity in order to protect appellee in any matter in which it had no remedy at law.

Respectfully submitted,

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BAYARD LACEY CATRON,
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Of Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 178

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM STATUTORY DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

SUPPLEMENTAL BRIEF OF APPELLANT ON FEDERAL AND EQUITY JURISDICTION

MAY IT PLEASE THE COURT:

Appellee filed its bill in equity herein to enjoin the Secretary of State of Illinois from collecting a franchise tax in the amount of $1000 assessed against it for the privilege of doing a local business in that State during the year commencing July 1, 1927 (R. 3-13).

Federal equity jurisdiction of this suit was invoked by appellee in its bill on the ground of diversity of citizenship and that the amount in controversy exceeded the sum of

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

WILLIAM J. STRATTON, Secretary of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation,
Appellee.

Appeal from Statutory District Court of the United States for the Southern District of Illinois, Southern Division.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

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IN THE

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OCTOBER TERM, A. D. 1931.

WILLIAM J. STRATTON, Secretary of the State of Illinois,
Appellant,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation,
Appellee.

Appeal from Statutory District Court of the United States for the Southern District of Illinois, Southern Division.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF CASE.

May It Please the Court:

Appellee is a corporation organized and existing under the laws of the State of Missouri. On October 19, 1903, it was "duly authorized to do business in the State of

Illinois, for a term of eighty-eight (88) years'' and became ''entitled to all the rights and privileges granted to foreign corporations under the laws of this state'' (Illinois). The amount of its capital at the time ''represented in the State of Illinois is $50,000.00'' (Rec., pp. 5 and 14).

At the time of its admission, appellee's authorized stock was $55,000,000.00.

Appellee afterwards increased its authorized capital stock to $130,000,000.00. As is usual, the amount of stock represented from year to year in Illinois fluctuated. At one time as much as $5,500,000.00 of its authorized capital stock was represented in Illinois. This was the equivalent to $1,533,324.23 of appellee's issued capital stock. It is charged in the bill of complaint that appellee had never paid an initial or admission fee in the State of Illinois on more than $5,500,000.00 of its authorized capital stock (Rec., p. 6), which represented the admission into Illinois of not over $1,533,324.43 of its issued capital stock.

At the time the appellee was admitted to do business in Illinois, no franchise tax was exacted by that state of any corporation. The only fees required to be paid to the state were upon the incorporation of domestic corporations and the admission of foreign corporations. Incorporation or initial fees from domestic corporations and the admission fees from foreign corporations were paid but once.

Prior to 1919, the State of Illinois required neither for-

eign nor domestic corporations to pay annual franchise taxes. In that year there was a general revision of the Corporation Act (Illinois Laws 1919, pp. 316-350), requiring franchise taxes based on authorized capital. Eight years later such franchise tax provisions were held invalid in the case of O'Gara Coal Co. v. Emmerson, 326 Ill. 18, which followed Air-way Electric Appliance Company v. Day, 266 U. S. 71. The Illinois Legislature immediately amended the statute (Laws 1927, pp. 359 to 360). This case involves such statute, as amended.

Appellant correctly sets forth Sections 105-107 of the Illinois Corporation Act and the method of the appellant used in calculating the tax claimed to be due from appellee. It should be noted, however, that the appellee was and is willing to pay a tax, based on that portion of its issued capital stock represented by property owned and business done in Illinois, in the manner provided by section 105. On such a basis, $270,420.00 of its issued capital being represented in Illinois, appellee would owe a tax of $132.21. In its bill of complaint, appellee offers to pay such amount (Rec., pp. 7-8), but appellant refused to accept such amount, insisting that under the proviso of section 105, appellee was lawfully required to pay in accordance with the scale of minimums of section 107. The validity of such scale of minimums, as sought to be applied to it, is challenged by appellee.

Throughout his brief, appellant treats the tax here involved as a price required to be paid by appellee for the

where, and also the amount transacted in Illinois, and the total value of its property wherever located, and the value of that part of it located in Illinois. If the percentage derived by dividing the business and property in Illinois by the total business and property of the corporation is larger than the percentage on which the original initial or entrance fee was paid, then an additional initial or entrance fee is paid covering the excess as shown by the annual report over the amount estimated at the time of entrance. This process is repeated each year, so that the foreign corporation has at all times paid, after the first year, for the privilege of doing business in Illinois an initial fee upon the maximum amount of its issued capital stock represented by business and property which it has at any time in its history had in Illinois (Section 101). It receives no refund of this payment in years in which its business and property diminishes over a preceding more prosperous year.

In addition to the admission tax of the foreign corporation, a franchise tax is exacted of it, covering the remainder of the first year of its admission (Sec. 129), based on the proportion of its issued capital stock represented in Illinois, as determined by the estimate stated in the application, pursuant to section 81.

Having admitted foreign corporation, as a quasi citizen, into the state, the State of Illinois requires both foreign and domestic to file an annual report; section 102 providing that:

"Each corporation, including railroads, domestic and foreign, * * * shall make a report in writing to the Secretary of State between the first day of February and the first day of March of each year on the forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December 31st preceding. * * * Such annual report shall also disclose such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax." * * *

On the basis of the annual reports filed by foreign and domestic corporations the Secretary of State of Illinois is required to determine the proportion of the capital stock represented by "business transacted and property located" in the state.

Section 106 provides that:

"In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated."

Having determined the amount of capital stock of each foreign and domestic corporation—so represented in Illinois, the Secretary of State computes their annual franchise taxes as is provided by paragraphs 105 and 107 of the statute and as set forth in appellant's brief. This annual payment is required without consideration of payments made in former years, and even though the corporation had paid a large sum of money in previous years under the former act which was declared unconstitutional (O'Gara Coal Co. v. Emmerson, 326 Ill. 18), it cannot set off the former payment illegally exacted against the amount presently due, nor in any other way recover taxes illegally collected by the State of Illinois as franchise taxes or initial fee (Montgomery Ward v. Stratton, 342 Ill. 472). No complaint is raised in this proceeding against the assessment of the initial fee or additional initial fees, or the annual franchise tax if fixed by section 105 at $135.21. The complaint of the taxpayer in this case is that Section 107 of the General Corporation Act, taken in conjunction with the last paragraph of section 105, provides in effect, that if section 105 does not produce the tax equal to the schedule set forth in section 107, then the schedule in section 107 shall apply.

In the instant case the tax under section 105 would be only $135.21 for the year in question, whereas the tax under section 107 provides a minimum of $1,000.00. As heretofore pointed out the initial or entrance fee is levied for the privilege of doing business in a state, and a fran-

chise tax under section 105, is levied annually on the exercise of that privilege, and is based and computed upon the amount of the exercise of the privilege. Section 107 disregards any such measurement, but provides arbitrary minimum sums which must be paid and which are based merely on the size or amount of the issued capital stock of the foreign corporation.

Section 92 provides that the Secretary of State may revoke the authority of a foreign corporation to do business in the state,

> "(2) if such corporation is transacting no business in Illinois and has no tangible property in this state";

or on the failure of such a corporation to pay the annual franchise tax. The statute provided for divers penalties, against the corporation and its officers, in the event it failed to comply with the statute (Sec. 114).

The State of Illinois levied a general property tax against all of appellee's property, both real and personal, which is located within its territorial limits, by valuation, at a uniform rate. The State of Illinois taxes, as personal property, the shares of appellee's stock owned by a resident of Illinois.

The franchise tax here involved is not in lieu of any of these taxes, but is in addition thereto.

CONTENTIONS OF APPELLEE.

Appellee contends, that, as applied to it, under the facts pleaded, paragraphs 105 and/or 107 of the Illinois Corporation Act are void, in that they take from appellee rights guaranteed to it by the Constitution of the United States:

1. Unreasonably burdening and directly taxing appellee's commerce between the states in violation of the commerce clause of the Constitution of the United States.

2. Taxing appellee's property and business outside the State of Illinois, and thereby depriving appellee of its property without due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Discriminating against appellee in favor of other foreign and domestic corporations, thereby denying it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

I. The minimum fee fixed by Section 107 of the General Corporation Act of Illinois is not a fee for the privilege of doing business in the state, but is an annual franchise tax—an excise—on that privilege or its exercise.

General Corporation Act, Chap. 32, Secs. 101, 105 and 107.

II. As to appellee, Sections 105 and/or 107 of the General Corporation Act of Illinois, are void, being a direct, as well as an unreasonable burden upon the interstate commerce engaged in by appellee, and also falling upon appellee's property outside of Illinois, and thereby burdening interstate commerce and depriving appellee of its property without due process of law, respectively, contrary to the commerce clause and to the Fourteenth Amendment of the Constitution of the United States.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Electric Co. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

After admitting a foreign corporation, a state cannot impose an annual excise, measured by its capital stock,

where the sole business, conducted by the corporation within the state, is in interstate commerce.

Alpha Portland Cement Co. v. Mass., 268 U. S. 212, 218;
Ozark Pipe Line Corp. v. Monier, 266 U. S. 561, 565.

The annual franchise tax, involved in this appeal, is not the same thing as an incorporation fee exacted of a domestic corporation or its complement, an admission or "initial" fee exacted by the state from foreign corporations seeking admittance (there being but one collection of the tax), as to which different rules apply.

Hanover Ins. Co. v. Harding (Carr), 272 U. S. 494;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
People of State of New York v. Latrobe, 279 U. S. 421.

The following authorities cited by appellant are distinguishable on the foregoing grounds:

General Ry. Signal Co. v. Va., 246 U. S. 500;
Latrobe v. N. Y., 279 U. S. 421.

A state may exact an excise of domestic corporations, measured by the whole amount of the corporation's stock —since the taxing state has granted the original corporate franchise, including the right to have such amount of stock. Appellee's power to have $36,294,750.00 of issued

stock was received from the State of Missouri and not from the State of Illinois. For this reason, a state may consistently with the Federal Constitution, exact an annual franchise of domestic corporations, measured by the whole of the corporation's capital stock, while it cannot exact such a tax, so measured, of foreign corporations.

Air-Way Electric Co. v. Day, 266 U. S. 71;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18.

Cases relied on by appellant and distinguishable on such grounds:

K. C., Ft. Scott & M. R. R. v. Kansas ex rel. Botkin, 240 U. S. 227;
K. C. M. & B. R. R. v. Stiles, 242 U. S. 111;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50.

III. As applied to appellee, Paragraphs 105 to 107 of the Illinois Corporation Act deny it the equal protection of the laws, discriminating against it and in favor of other domestic and foreign corporations having like business and assets in Illinois, but a smaller amount of issued capital stock.

A state, in levying excises on corporations, cannot consistently, with the equal-protection-of-the-laws clause, discriminate in any way:

(a) Between foreign corporations of the same class which it has admitted into the state.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;

Hanover Ins. Co. v. Carr, supra, 272 U. S. 494, Op. 510;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32.

(b) Discriminate in any way against such foreign and in favor of domestic corporations.

Southern Ry. Co. v. Greene, 216 U. S. 400, 418.

(c) Nor discriminate between domestic corporations.

Royster Guano Co. v. Virginia, 253 U. S. 412.

As applied to appellee, the statute violates the equal protection clause, because the tax is not limited to that part of appellee's capital stock justly apportionable to the State of Illinois and because the method of fixing such tax bears no reasonable relation to the value of the privilege granted.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71.

Although having power to exclude foreign corporations, a state cannot limit entry on condition that such corporations waive any of their constitutional rights.

Looney v. Crane, 245 U. S. 178, Op. 187-8;
Western Union v. Kansas, 216 U. S. 1, Op. 47-8;
Pullman Co. v. Kansas, 216 U. S. 56, Op. 63-4;
Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, Op. 507;
Frost v. R. R. Comm., 271 U. S. 591, at 593-4, 599.

Appellee's authority to issue stock or the number of shares it may have issued and outstanding does not depend upon the laws of Illinois. Its sole authority in that respect depends upon the laws of Missouri under which it was created.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32.

The Illinois statutes prohibit appellee from acquiring other railroad properties without first securing a certificate of convenience and necessity from the Illinois Commerce Commission.

Smith-Hurd Statutes 1927, Chap. 111⅔, Par. 56;
Cahill's Ill. Rev. Statutes 1927, Chap. 111a, Par. 71.

Under which statute, as construed by the Illinois courts, no certificate of convenience and necessity can be granted to an applicant as long as any other utility in the field is rendering adequate service.

Egyptian Transportation System v. Louisville & Nashville R. R., 321 Ill. 580;
Illinois Power & Light Corp. v. Illinois Commerce Commission, 320 Ill. 427.

privilege annually sold by the State of Illinois to appellee, of being a corporation and exercising corporate franchises in Illinois for the year covered by the franchise tax. In other words, appellant endeavors to treat this tax as if it were the incorporation "initial" fee required of a domestic corporation or the "admission fee" of a foreign corporation. In fact, the tax here involved is a "franchise tax"—an excise—a tax upon a privilege of being admitted to do business in Illinois as a corporation for eighty-eight (88) years from October 19, 1903; which privilege was sold (granted) to appellee in 1903.

For such reason and in order that the true nature of this tax may be made the more apparent, we deem a more detailed explanation of the operation pertinent provisions of the Corporation Act (which are set out in full in the appendix hereto) to be necessary.

The State of Illinois exacts, and, at the time this controversy arose, exacted, from domestic corporations (Sec. 96) an "initial" (incorporation) fee, but once paid on its stock as issued (no fee being paid on authorized but unissued stock), and also an annual franchise tax for the remainder of the first year (Sec. 129) and yearly thereafter (Secs. 105-107).

Section 80 provides that every foreign corporation shall, "before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State."

Section 81 provides the form of such application in the manner of a questionnaire covering information, from which the Secretary of State may compute the proportion of its capital stock which will be represented in Illinois during the remainder of the first calendar year of its admission by the corporation's estimate of its business to be done within and property to be brought into the state during that period, and by a like estimate of its business and property in all states during the same period.

Section 101 provides for an admission fee (the complement of the "initial" or incorporation fee charged domestic corporations by section 96), requiring a foreign corporation to pay for a "certificate of authority to do business in Illinois, the same fees provided by this to be paid by a similar corporation incorporated under the laws of this state. * * * All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois." The first payment on the initial or entrance fee is made before the corporation has done any business in Illinois, and it therefore makes an estimate of the amount of business and property it will have in Illinois and the amount of business and property everywhere, and from the proportion of these is determined the proportion of capital stock on which it will pay the original initial or entrance fee. In February of each year thereafter the foreign corporation makes a report showing the actual amount of business in dollars and cents which it transacted every-

ARGUMENT.

NATURE OF THE TAX.

I. The minimum tax fixed by the Illinois statute is not a fee required to be paid by appellant to the State of Illinois in exchange for the privilege of admission into the state and doing business therein, but is an annual excise tax laid on such privilege.

In the statement we directed attention to the fact that appellant's brief treats the tax here involved as a consideration required to be paid by appellee for the privilege of doing business in the State of Illinois. In truth and in substance nothing could be further from the fact. In 1903 appellee purchased from the State of Illinois the privilege of doing business in the state for a period of eighty-eight years, which will expire in the year 1991. It may be said that the purchase at that time was limited to the bringing within the state of up to $50,000.00 of its authorized capital. If so, then since that date it has purchased from the State of Illinois the right or privilege of bringing into the state up to $5,500,000.00 of its authorized capital or (if the issued capital be apportioned) $1,533,324.43 of its issued capital.

Inasmuch as the State has sold the privilege of doing a corporate business in Illinois to appellee, for a consideration, it cannot now exact additional compensation for that privilege.

The State may, however, tax the extraordinary privilege and franchise which it has given. The tax here involved is an excise. It is a tax on the exercise of the extraordinary privilege heretofore granted appellee, of being admitted into Illinois. Initial fees required of domestic corporations and the admission fees required of foreign corporations, constitute the price paid to the State of Illinois by such corporations in exchange for their corporate existence and powers. The excises required by Sections 105 and 107 of the General Corporation Act of Illinois are purely revenue-producing measures—a franchise tax upon the exercise by appellee and other corporations of a franchise and contract right previously granted. That the annual minimum franchise tax herein claimed to be unconstitutional is not attempted to be levied for the privilege or authority to do business in Illinois is made quite obvious by the language of section 101, which fixes the fee for that privilege. Said section, in part, reads as follows:

> "Each foreign corporation for pecuniary profits, * * * in addition to the annual franchise fees of taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois, the same fees provided by this act to be paid by similar corporations incorporated under the laws of this State."

The privilege so granted, when once paid for, continues until the corporation voluntarily withdraws from the

State as provided in the act, or is required to withdraw by action of the Attorney-General in a proper proceeding in court. Section 126 of the act requires the Secretary of State on or before the 15th of November of each year, to send to the Attorney-General a list of corporations delinquent in filing an annual report or in paying annual franchise taxes. The Attorney-General is commanded by said section to institute proceedings against such corporations thereafter, for the revocation of their charter or license, and provides for the stay of such proceedings if the corporation presents a report and pays the fees, taxes and penalties due.

On admission the state may charge what it pleases for the granting of the right, the franchise to be a corporation in the state, so long as it does not attempt to require the waiver of any constitutional rights or discriminate between applicants.

But, once admitted, the state has no such broad power as regards the levying of excise taxes on the privileges granted by it.

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal-protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state.

> With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality, as between the foreign corporation and the domestic corporation in that regard, does not come within the inhibition of the Fourteenth Amendment, but, after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."
>
> Hanover v. Harding (Carr), 272 U. S. 494, Op. 510-511.

The franchise tax involved in this appeal is therefore a much different thing than the incorporation fee exacted of a domestic corporation or its complement, an admission or "initial" fee exacted by the state of foreign corporations seeking admittance (there being but one collection of the tax), as to which different rules apply, as in

> New York v. Latrobe, 279 U. S. 421;
> Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50.

THE QUESTIONS INVOLVED IN THIS CASE.

We say, therefore, the question is not (as stated by appellant, Brief, p. 12) whether

> "the State may require a corporation organized or admitted to do business in the state, to pay a minimum fee or franchise tax, as provided in sections 105

and 107, for granting it the privilege of doing business in the state during the next year, although it may not have actually exercised its franchise in the state the preceding year to a sufficient extent to produce such an amount of tax at the rate specified in section 105."

Actually, the questions involved in this case are:

1. May the gross amount of the issued capital stock of a foreign corporation, consistently with the commerce and due-process clauses of the Constitution, be made the measure of an annual excise exacted by the state, of a foreign corporation, before that time admitted into the state, irrespective of the amount of the capital stock of such corporation actually represented in the state—particularly where only a portion of the corporation's stock has been admitted into the state?

2. May a state, consistently with the equal-protection clause of the Constitution, exact an annual excise from a foreign corporation which it had previously admitted, basing said tax as to one corporation on its total issued stock, irrespective of the amount of said stock represented in the state, and as to other corporations, both foreign and domestic, based on the proportion of their stock represented by property and business in the state, and resulting in the one corporation paying a larger tax on each dollar of its capital stock represented in the state than is paid on each dollar of the capital stock (represented in the state) of such other corporations?

3. Does a state statute exacting an annual excise of foreign corporations, measured and graduated according to the gross amount of the issued capital stock of such corporation and without regard to the amount thereof represented in the taxing state, consistently with the equal-protection clause, require like fees for equal privilege held by all foreign corporations under the same circumstances?

II.

The tax here involved is, as to appellee, void, inasmuch as it burdens interstate commerce and deprives appellant of property without due process of law.

On this point we wish to assert our faith in the correctness of the determination of this cause by the Statutory Court. We respectfully insist, as we did before that Court, that the case of Cudahy Packing Company v. Hinkle, Secretary of State, et al., 278 U. S. 460, is directly in point and controls.

The theory and fundamental basis of the Illinois Franchise Tax Statutes is to require each corporation to pay an annual franchise tax of 5 cents per $100.00 on that part of its issued capital stock represented by property owned and business done in Illinois.

The scale of minimums set forth in section 107, on its face, applies only to corporations without either capital, assets or business in Illinois. It is made applicable to appellee by reason of the proviso of section 105. The

actual effect of the statute, as appellee seeks to apply it in this case, is that, having determined the franchise tax which appellee should pay upon that portion of its capital stock represented by property and business in Illinois ($135.21), and having found that the tax as so determined was small in amount, the State of Illinois arbitrarily fixes an annual tax in a larger amount ($1,000.00). If $135.21 represents the tax on that portion of appellee's capital represented by property and business in Illinois, then when the State of Illinois arbitrarily demands an additional $864.79, such additional tax, if paid, necessarily falls on that part of appellee's capital stock which is represented by property and business without the State of Illinois.

The effect of the commerce clause was first considered with reference to a franchise tax in the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190. This Court specifically held void, as being in violation of the commerce clause, a Kansas statute requiring foreign corporations (before that time admitted to intrastate business) to pay as a franchise tax a fixed (one-tenth of one percent) percent of their authorized capitals. The Court reasoned that as the whole of the capital stock represented the whole of the corporation's property and business; and, as only a part of the corporation's capital, property and business was in Kansas, the tax on all of its capital stock was, of necessity, a tax on all of its property and all of its business, which included its interstate busi-

ness and property in other states. By reason whereof the tax was in part a direct burden, a direct tax, on the corporation's business in interstate commerce, and therefore void. It is only where the burden is indirect or incidental that the commerce clause would not be violated unless the burden be unreasonable.

Here, as in the Western Union Co. case, the tax is a direct burden on the interstate commerce conducted by appellee, because one hundred thirty-five and 21/100 ($135.21) dollars is the tax which would be due from appellee on the proportion of its capital stock represented by property owned and business done in Illinois. The balance of its capital stock is represented by property and business in other states. The appellant demands eight hundred sixty-four and 79/100 ($864.79) dollars additional. If paid, then, of necessity, it is a tax and a direct burden upon all of appellee's property and business, including appellee's property in other states, its interstate commerce, and it is void.

The principle of the case of Western Union Co. v. Kansas, 216 U. S. 1, was followed in the cases of Pullman Co. v. Kansas, 216 U. S. 56; Ludwig v. Western Union Tel. Co., 216 U. S. 146; A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280. Then came the decisions upon which appellant most strongly relies.

In Baltic Ming. Co. v. Mass., 231 U. S. 68, the Court sustained a statute levying an annual excise of one-fiftieth of 1 per cent on the authorized stock of foreign corporations

doing business in Massachusetts; said tax, however, being limited to a maximum of $2,000.00.

In Cheney Bros. v. Mass., 246 U. S. 147, the Court again sustained the same statute in a case which arose under practically the same circumstances, the decision being expressly on the authority of the Baltic Ming. Co. case.

In the cases of K. C. Ft. Scott & M. R. R. v. Botkin (Kansas), 240 U. S. 227; K. C. M. & B. R. R. v. Stiles, 242 U. S. 111, this Court sustained a statute levying an annual excise measured by the entire stock of domestic corporations, as to which, as heretofore pointed out, a different rule exists.

A state which creates a domestic corporation, giving it the power to be a corporation and to have a capital stock of a certain amount, may properly levy an excise measured by the entire amount of the stock of a domestic corporation. As to foreign corporations admitted in such a state, the rule is different, and the cases relied on are clearly distinguished.

This point was emphasized in the case of Roberts-Schaefer Company v. Emmerson, 271 U. S. 50, in which the Court, after discussing the Air-Way Electric Appliance Company case, said:

> "We cannnot say that a state may not impose a franchise tax on a domestic corporation, measured by its authorized capital stock" (citing the Botkin and the Stiles cases) (Op. 54).

In the case of K. C. Ft. Scott & M. R. R. v. Botkin (Kansas), 240 U. S. 227, at 230, the difference was indicated, the Court saying:

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the state. The authority of the state to tax this privilege or franchise has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which, in part, may represent property not subject to the state's taxing power" (Op. 232).

The question was next considered in the case of Looney v. Crane Co., 245 U. S. 178. A statute of the State of Texas required foreign corporations to pay permit and franchise taxes, graduated according to their authorized capital stock. This statute was held to violate the commerce and the due-process clauses of the Constitution of the United States. The cases of Baltic Min. Co., Botkin and Stiles, just referred to, were urged as authority on which the Texas statute should be sustained. In referring to the Western Union cases, the Court said that their "dominancy" (Op. 188) was plainly shown. Referring to the decisions there and here relied upon by the taxing states, the Court said:

"It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion, since the later cases rested upon particular provisions in each particular case, which, it was held, caused the general and recognized rule not to be applicable" (Op. 190).

After the decision of the Baltic Min. Co. case, the Massachusetts Legislature removed the maximum limit of franchise taxes. Otherwise the statute remained the same, and in International Paper Co. v. Mass., 245 U. S. 135, this statute, with the maximum limit removed, was held to violate the commerce and the due-process clauses.

The cases of Ozark Pipe Line v. Monier, 266 U. S. 515, Alpha Portland Cement Co. v. Mass., 268 U. S. 203, involved annual franchise taxes sought to be imposed on foreign corporations which had been admitted into the taxing state, had property therein, but did only an interstate business. It was held that any franchise tax imposed on such corporations, necessarily fell upon all capital stock of such corporations and burdened the interstate commerce in which they were engaged. It was urged that the Baltic case was authority for the proposition that a tax which fell on interstate commerce would not be held invalid unless it was of a substantial amount. In regard to this, the Court said:

"The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the lan-

guage of Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 87, 58 L. ed. 127, 134, 34 Sup. Ct. Rep. 15, tends to support a different view, it conflicts with conclusion reached in later opinions, and is now definitely disapproved."

Alpha Portland Cement Co. v. Mass., 268 U. S. 203, op. 218.

In these cases, the corporations retained and maintained their rights to do business (just as appellee did in Illinois) in the state—which granted the privilege of doing a local business. If a franchise tax cannot be imposed where the foreign corporation, after admittance, does no local business, it necessarily follows, that if such a corporation does a small amount of local business, a franchise tax, out of proportion to such business, and not in a fair manner, measured by it, cannot be exacted, without burdening commerce and property beyond the state.

The case of Air-Way Electric Appliance Co. v. Day, 266 U. S. 71, involved franchise tax based on the portion of the authorized stock of a foreign corporation (only a part of which was issued), represented by property owned and business done in the taxing state. It was held that the tax in so far as it was based on the authorized but unissued stock, of necessity, fell on issued stock which represented commerce between the states carried on by the corporation.

"As some of the outstanding shares are represented by plaintiff's interstate business the application of the

rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce, of the plaintiff (International Paper Co. v. Massachusetts, supra, 142). We hold that the act violates the commerce clause."

Air-Way Electric Appliance Corp. v. Day, Op. 226 U. S. 71.

The actual effect of Sections 105-107 of the Illinois statute is the same as the actual effect of the Ohio statute. The body of section 105 fixes a tax on the basis of property owned and business done in Illinois. The proviso of section 105 singles out a class of corporations (including appellee) and after making allowance for the franchise tax as capital measured by the property and business in Illinois, it places an additional burden and tax on them—the scale of minimums provided by section 107. This additional burden and tax must, in part, fall on and directly burden appellee's commerce between the states.

If the State of Illinois had levied a tax based on the authorized stock of appellee (a part of which is unissued), it would be void. If the tax was based on any part (but not all) of the authorized but unissued stock, we do not believe the Court would have any hesitancy in declaring it to be void. Here, the tax is based, first, upon appellee's issued stock represented in Illinois, and then an additional amount is arbitrarily added thereto. There is no difference, in substance, between the decided cases and this.

The Court last considered this question in the case of Cudahy Packing Co. v. Hinkle, 278 U. S. 460. A statute of the State of Washington, requiring local and foreign corporations to pay an annual tax, graduated and scaled according to their authorized capital stocks, was held void as being in violation of the commerce and due-process clauses.

Appellant distinguishes the Cudahy case on the grounds that the tax was measured by authorized, rather than issued, stock. This particular difference would seem to be pertinent only in connection with questions involving the equal-protection clause, which, in that case, the Court found unnecessary to consider. In deciding the questions involving the commerce and due-process clauses, if the Court had in mind that the basing of the tax on authorized, rather than issued, stock was of any consequence, no mention was made of such fact.

It might be observed that the Illinois act has no maximum limit, and the minimum of taxes charged against appellee for the year in question is $1,000. The paid-in capital stock of the Cudahy Company was $29,800,000—the paid-in capital stock of appellee company is $36,249,750. Under the Illinois statute, if applied to the Cudahy Company, under the facts of that case, it would have been required to pay $1,000 minimum franchise tax the same as appellee company. Under the Washington statute it was required to pay only $580. The value of the Cudahy Company's property in the State of Washington was

$40,000—the value of the appellee corporation's property in Illinois is $801,196. The Cudahy Company could not remove its property from Washington without interfering with the conduct of its interstate business, and neither can the appellee remove its property from Illinois without like interference. Both must submit to a confiscation of that property by the abandonment of their right to do business as interstate agencies in the respective states. The amount of the confiscation in the Cudahy case is about one-twentieth of the amount in the appellee corporation case. The gross receipts of the Cudahy Corporation in the State of Washington for the year in question was $1,313,275. The gross receipt in the appellee corporation case in the State of Illinois for the year in question is $2,868.36, or less than one six-hundredth of the amount of the gross receipts of the Cudahy Corporation. If the payment by the Cudahy Corporation of $580 as a franchise tax out of the gross receipts of $1,313,275 and the abandonment of $40,000 worth of property used in interstate commerce imposed a burden upon its interstate commerce, or a tax upon its property in other states, then a fortiori the payment by the appellee corporation of $1,000 out of the gross receipts of $2,868.36 and the abandonment by it of $801,196 used by it in the conduct of its interstate business constitutes a burden upon its interstate commerce and must constitute a tax on its property in other states.

If we consider and compare the purposes of the Cudahy

Corporation and that of the appellee corporation, it is obvious that the case at bar is a much stronger case from that point of view also. The Cudahy Corporation was engaged in selling and marketing meat products. The appellee corporation is a railroad engaged in carrying traffic, principally between the states. Appellee corporation must accept freight offered it because it is a public carrier; the Cudahy Corporation could buy and sell to whom it chose.

A railroad corporation's interstate commerce is much more interwoven with its intrastate commerce than is that of a mercantile company. Cudahy Corporation did six one-thousandths of its total business in Washington. The appellee corporation does about eight one-thousandths of its business in Illinois.

We respectfully submit that the decision in the Cudahy case is controlling in the current case; that the scale of minimums of Section 107 of the Illinois Act is entirely similar in its form and effect to that of the Washington act and is much more onerous from a monetary point of view.

In this comparison we have entirely disregarded the other factor in the Cudahy case, namely, the initial or entrance fee. The appellee corporation has already paid this fee in Illinois and no question is here raised concerning it. The Cudahy Company was relieved from the obligation of paying that fee because the statute imposing it was drawn upon the same lines and upon the same basis

as the annual fee required. The State of Illinois, by the scale of minimums of Sec. 107 has disregarded all the restrictions imposed upon it by the Federal Constitution and such scale is void for the same reasons as the statute involved in the Western Union v. Kansas, the Looney v. Crane, the International Paper Company, Air-Way Co. v. Day and Cudahy Packing Co. v. Hinkle cases was unconstitutional and void.

It is argued (presumably because appellee has a large issued capital stock) that it may be assumed that appellee will bring more of its capital into the state than had been there represented during the previous year. Past experience does not warrant such an assumption. Furthermore, appellee, being a public utility, cannot, under the Transportation Act or the Illinois Commerce Act, extend its lines in Illinois, thereby bringing more of its property and business into the state, without first securing a certificate of convenience and necessity. Neither can it discontinue its railroad operations in Illinois without such a certificate. Under the decided cases in Illinois, even though appellee applied for a certificate of convenience and necessity, it would not be entitled to receive the same as long as any other utility was rendering adequate service in the field it proposed to serve. (See cases cited in brief.) Yet appellant urges the State of Illinois has the right to assume that appellee will, in any ensuing year, bring into the state enough of its property and business to warrant a tax levied according to the scale of minimums of section 107.

Appellant relies mainly on the case of General Railway Signal Co. v. Virginia, 246 U. S. 500, which involved the legality of an "admission" fee, rather than a franchise tax, against which the only contention made was that it unreasonably burdened interstate commerce. The difference has heretofore been pointed out. That such difference exists is evidenced by the language of the Court in the case of Hanover Ins. Co. v. Harding, 272 U. S. 494, heretofore quoted, and in the case of New York v. Latrobe, 279 U. S. 421, wherein the Court said:

> "The tax, denominated a 'license fee,' is paid but once, purports to be imposed on the corporation 'for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state,' and the obligation to pay it is made a prerequisite to obtaining a certificate of authority from the state and to the continuance of business there (People ex rel. D. W. Griffith v. Loughman, 249 N. Y. 369, 164 N. E. 253). But the foreign corporation is permitted to transact business and make valid contracts within the state prior to payment of the tax, which of necessity cannot be computed or paid until after the first year has elapsed. The tax is evidently the complement of the organization fee, computed in like fashion on the authorized capital stock of domestic corporations by Chapter 143 of the Laws of 1886" (Op. 423).

The State of Virginia did not exact any annual franchise or license fees. The admission fee considered by the Court was due at the time the corporation was admitted to, or did business in, the state.

In its opinion the Court stated that the case was "on the border line" (Op. 511).

III.

The tax here involved is, as to appellee, void, inasmuch as the tax and the statute, pursuant to which it is laid, discriminates against appellee and in favor of other corporations, both foreign and domestic, in violation of the Equal Protection Clause.

Sections 105-107 of the General Corporation Act of Illinois, on the face as well as in the present application thereof, act to deprive appellee of the equal protection of the laws. Appellee is discriminated against, as compared to other corporations, both foreign and domestic, who pay franchise taxes on the basis of 5 cents of each $100.00 on that portion of their capital stock represented by property and business in Illinois.

In the consideration of this question we urge that the Court keep in mind that, so far as the State of Illinois is concerned, appellee has never asked that more than $1,533,324.23 of its issued capital stock be admitted. It has never asked the State of Illinois for authority to bring more than that amount of its assets and business represented by that amount of its issued capital into the state. So far as the State of Illinois is concerned, it is quasi Illinois corporation, with an issued capital of that amount, of which $270,420.00 was represented by property and business in the state during the period which is the

basis for the tax here involved. The State of Illinois did not authorize appellee to have an issued capital stock in the amount of $36,294,750.00. We can conceive of no basis reasonably connecting appellee's stock, which has never been admitted to Illinois or used in Illinois, with a franchise tax imposed by the State of Illinois. There is no more connection between such stock and the taxable value of appellee's franchise to do business in Illinois than there is between appellee's authorized stock and the taxable value of its franchise to do business in Illinois. The same reasoning which compelled the Court to hold that the Ohio franchise tax measured in part by the authorized but unissued capital stock of the Air-Way Electric Appliance Company to be void, necessitates a similar holding in this case.

Appellant says that the amount of issued stock bears a fair relation to value of the annual franchise to do business. Assuming this to be so, nevertheless the ratio of property owned and business annually done bears a more true relation to the value of the franchise, and the state discriminates against appellee by taxing some corporations on one basis (the one having a real direct and more true relation to the value of the privilege) and taxing appellee a proportionately greater amount on a more remote, arbitrary and less true basis.

On its face, therefore, the statute is discriminatory, first, because it bases the tax on a large part of appellee's stock which was not and had never been represented in

Illinois; and, secondly, because it fixed two "bases" for a franchise tax, which, when applied, assess taxes in different amounts, acting more favorably towards some corporations and less favorably towards others, including appellee.

We say, to justify this statute, appellee must be in receipt from the State of Illinois of some actual and substantial privilege or advantage which other corporations, foreign and domestic, paying less, or proportionately less, do not receive. No such benefit can be suggested by appellant.

Appellee's right to be a corporation with authority to issue a certain amount of capital stock, to engage in a certain business, and its invested powers, are all granted to it by Missouri, the state of its incorporation.

The sole right which appellee seeks from or receives from the State of Illinois is to enter that state and do a local business.

In its application, as well as on its face, the Illinois statute discriminates against appellee; $270,423.00 of appellee's issued capital stock is represented by property and business in Illinois. On this amount of issued capital stock the ordinary corporation would be required to pay an annual franchise tax of $135.21. A tax of $1,000.00 is claimed by the State of Illinois. A corporation with an issued capital stock of $270,423.00, having all of its property and business in Illinois, would pay only $135.21. A corporation with a total issued capital stock of $1,533,-

324.23 (the largest amount of appellee's issued capital, which, during any year, was represented in Illinois), and with $270,423.00 of that capital represented in Illinois, would pay but $135.21. A corporation, either foreign or domestic, must have had $2,000,000.00 of its issued stock represented in Illinois before its tax would be $1,000.00, under section 105. Such corporations having similar amounts of their capital in Illinois—exercising the same taxable privileges as appellee—would pay only one-seventh of the tax which is demanded of appellee.

In the Air-Way Electric case this Court said:

> "The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement" (Op., p. 83).
>
> Air-Way Electric Appliance Co. v. Day, 266 U. S. 71.

The tax is "not limited to the part of the capital stock justly apportioned to the taxing state."

International Shoe Co. v. Shartel, 279 U. S. 4[illegible].

As applied to appelle[illegible]nd weighted by such a test, sections 105-107 of the I[illegible] statute require appellee to pay a franchise tax which has no fair and reasonable relation to the value of the privilege granted, and the tax is

its principal office or place of business without this state, and the location of the proposed principal office or place of business in this state;

(b) The names of the states in which it has qualified to do business under the corporation laws thereof;

(c) The character of business which it intends to carry on in this state;

(d) An itemized estimate of the amount of tangible property to be employed by it in the state during the first year next after the date on which it shall be licensed and begin to do business in this state;

(e) An estimate of the total amount of the capital to be employed by it in this state and an estimate of the total amount of capital to be employed by it elsewhere during such year, itemized as follows:

(1) The value of patent rights, licenses, franchises, trade-marks, secret processes, copyrights and good will.....$.....

(2) Contracts or choses in action.....$.....

(3) Merchandise, raw materials and goods in process of manufacture.....$.....

(4) Book accounts and notes.....$.....

(5) Machinery and real estate.....$.....

(6) Stock in other corporations and securities .....$.....

(7) Furniture, fixtures, stationery and like articles .....$.....

(8) Cash in bank.....$.....

(9) Kinds and amount of other personality (personalty) .....$.....

(f) An estimate of the annual business to be transacted by the corporation everywhere;

(g) An estimate of the annual business to be transacted at or from places of business in Illinois;

(h) The name and address of some person permanently residing in this state, upon whom, as the resident agent of the corporation until his successor shall have been appointed, service of legal process may be had, and the names and addresses of the officers and directors;

(i) Such other information touching the property and business of the corporation as the Secretary of State may require;

In the case of telegraph, telephone, cable, railroad or pipe line corporations, in addition to the itemized estimate of the total amount of capital to be employed in this state, there shall be given the total length of such telephone, telegraph, cable, railroad or pipe line, and the length of the line located in this state and the total value of such line and the value of such line in this state.

Sec. 92. **Revocation of Certificate of Authority to Do Business—Grounds.**—The certificate of authority of a foreign corporation, subject to the provisions of this act, may be revoked by the Secretary of State:

(1) Upon failure of an officer, director or manager, to whom interrogatories are propounded, to answer the same fully and to file such answer in the office of the Secretary of State within thirty days after the mailing of the same;

(2) If such corporation is transacting no business in Illinois and has no tangible property in this state;

(3) If the answer to interrogatories propounded by the

Secretary of State discloses, or if the fact is otherwise ascertained, that the proportion of the capital stock of such corporation represented in this state is greater than the amount theretofore paid upon by such corporation and the deficiency in such fees is not paid within thirty days of the receipt of a notice sent by mail to the president and secretary, or to the statutory agent of such corporation of record in this state, or to the attorney filing the interrogatories for such corporation, or is not paid within such extension of time as may be granted by the Secretary of State;

(4) Upon failure of such corporation to keep on file in the office of the Secretary of State duly authenticated copies of each instrument amending its charter;

(5) Upon failure of such foreign corporation to appoint and maintain an agent in this state upon whom service of legal process may be had;

(6) Upon failure, neglect or refusal to file an annual report as required by this act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the thirty-first day of July of the year in which such franchise tax becomes due and payable;

(7) Upon failure, neglect or refusal to file a certificate of issuance of stock and the payment of the fees required by this act.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 94. **Unlicensed Foreign Corporation Doing Business in State—Actions and Suits by—Penalties—Recovery.**—No foreign corporation doing business in this state without a

license shall be permitted to maintain any suit at law or in equity in any of the courts of this state upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor of not less than two hundred and fifty dollars nor more than one thousand dollars, to be recovered in any court of competent jurisdiction, in a civil action to be begun and prosecuted by the Attorney-General.

Sec. 96. **Incorporation Fee—Increase of Capital—No-par-value Stock, Basis of Fee—Public Utility Corporations.**—The Secretary of State shall charge and collect an initial fee of one-twentieth of one percentum upon the amount of the capital stock which the corporation, has issued or it proposes to issue at once, but in no case shall such fee be less than twenty dollars, and a like fee of one-twentieth of one percentum upon filing a certificate of any subsequent issue or increase of capital stock and, in addition thereto, the same fee as that required for filing other certificates of amendment. In the event that the corporation has capital stock of no-par value, its shares, for the purpose of fixing the fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares. Each public utility corporation, including railroads, shall pay to the Secretary of State the same fees as are required to be paid for incorporation by other corporations organized for pecuniary profit.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 101. **Foreign Corporations—Fees for Certificate of Authority—On Increase of Stock—On Extensions, Consolidations, Mergers, Amendments—Basis of Fees—Where**

Capital Stock Without Par Value.—Each foreign corporation for pecuniary profit, other than an insurance company or building and loan company, in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois, the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state. Each foreign corporation, heretofore or hereafter admitted to do business in this state, shall also pay for increases in the amount of capital stock represented in Illinois, for extensions of existence, consolidations, mergers and for filing amendments the same fees required to be paid by corporations organized under the laws of this state. All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois. Whenever it shall appear that the amount of capital stock represented in Illinois is greater than the amount theretofore paid upon by any foreign corporation, such corporation, before it shall continue to transact business in Illinois, shall pay to the Secretary of State upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock equal to the amount of such excess.

If a foreign corporation has a capital stock of no-par value, its shares, for the purpose of estimating the amount of fees and taxes to be paid hereunder, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 102. **Annual Reports—What Corporations Required to Make—Time for Making—Contents—Verification—Publication of List of Reporting Corporations—Copy to Recorder of Deeds.**—Each corporation, including railroads, domestic and foreign, other than homestead associations, building and loan association[s], banks, religious corporations, insurance companies, and corporations not for pecuniary profit, shall make a report in writing to the Secretary of State between the first day of February and the first day of March of each year on forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December thirty-first preceding (except in case the corporation keeps its accounts on the basis of a fiscal year not identically with the calendar year it shall make report for the fiscal year next preceding February first of the year in which such report is made. The other information required in such report shall be given as of the date of execution of such report. In case the corporation has not been in existence a year it shall furnish the Secretary of State the information required for the period since it was incorporated or admitted. Such report shall give the address of the corporation, officers and directors in this state by street and number. Such annual report shall also disclose such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state, and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax. Such report shall be verified by the oath of the president, vice-president, secretary, assistant secretary or treasurer of the corporation, but in

case the corporation is in the hands of an assignee, receiver or trustee, then such report shall be signed and verified by such assignee, receiver or trustee.

The Secretary of State shall, on or before the 15th day of January of each year, forward to each corporation of record in his office a copy of the forms to be used in making the report specified in this act, but the failure to send or to receive such forms shall not relieve the corporation from the duty of making such report.

The Secretary of State shall publish on or before September first of each year a list of corporations filing an annual report in accordance with the provisions of this act, with the names and addresses of the president and secretary of domestic corporations or the agent for service of legal process of foreign corporations, and shall furnish a copy thereof to each Recorder of Deeds.

Sec. 105. **Annual License Fee or Franchise Tax—Amount—Minimum—No-Par-Value Stock.**—Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by the act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall

be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended, L. 1927, p. 354, approved and in force May 12, 1927.

The 1927 amendment carried an emergency clause, as follows:

Sec. 2. Whereas, the Supreme Court of this state has held that certain sections of the General Corporation Act, which based the fees on the authorized capital stock, are unconstitutional as to foreign corporations;

Whereas, under the decision of the Supreme Court the Secretary of State will not be able to collect the fees from corporations to which the state is entitled and, further, that all of the annual franchise tax provisions of said act are in danger of being invalidated unless said sections are amended, and,

Whereas, the Secretary of State is, under the provisions of section 112 of the aforesaid act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing, to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first, and,

Whereas, unless this act becomes effective on or before May fifteenth the state will lose the fees from corporations to which the state is justly entitled;

Therefore, an emergency exists and this act shall

take effect and be in full force from and after its passage.

L. 1927, pp. 359-60.

Sec. 106. **Ascertainment of License Fee or Franchise Tax in Case of Corporations Generally.**—In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 107. ——**Basis in Case of Corporation Without Property in State and Doing No Business in State—Where Stock of No-par Value.**—In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; cor-

porations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares..

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 108. **When Franchise Tax Payable.**—The franchise tax herein provided to be paid shall be due and payable on the first day of July of each year and shall be the franchise tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter.

Sec. 109. **Assessment of Tax From Annual Report—Corporations Organized Between January 15 and March 1.**—The Secretary of State shall, from the annual report filed, assess a tax at the rates herein prescribed against each corporation required herein to make an annual report.

The Secretary of State shall, from the best available information, also assess such tax on all corporations organized or admitted between the fifteenth day of January and the first day of March.

Sec. 112. **Notice of Amount of Franchise Tax—Contents —Failure to Receive.**—Between the first day of February and the fifteenth day of June, of each year, the Secretary of State shall mail a notice in writing to each corpora-

not limited to that part of appellee's capital justly apportioned to Illinois.

For the foregoing reasons appellee respectfully insists that the decree of the Statutory District Court for the Southern District of Illinois should be affirmed.

Respectfully submitted,

J. R. TURNEY,
JOSIAH WHITNEL,
Attorneys for Appellee.

CARTER, JONES & TURNEY,
H. L. BROWNING,
Of Counsel.

APPENDIX.

All references are to

Chapter 32, Cahill's Revised Statutes 1927;
Chapter 32, Smith-Hurd Revised Statutes 1927.
Section numbers are identical in both volumes.

Sec. 80. **Certificate of Authority to Do Business—Requirement as to payment of Capital Stock.**—Each foreign corporation organized for pecuniary profit (except banking, insurance, building and loan and surety companies), not now licensed to do business in this state, shall, before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State. No certificate shall issue to any foreign corporation authorizing it to transact business in this state until the same amount is paid on each share of stock issued or to be issued as is required of like corporations organized under the laws of this state.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 81. **Filing Application With Secretary of State—Contents.**—A foreign corporation desiring a certificate of authority hereunder shall file in the office of the Secretary of State:

(1) A copy of its charter duly authenticated by the proper officer of the state or country where it is incorporated;

(2) A statement verified by its president and secretary or other officer setting forth:

(a) The name of such corporation and the location of

respect to executions issued against property upon judgments of courts of record, and shall be entitled to the same fees for the execution of the warrant, to be collected in the same manner. After proceeding in the manner prescribed, the Sheriff shall make the proper and necessary notations, of the amounts collected, upon the warrant and promptly return it to the Secretary of State within ninety days from the date of issuance thereof, with the amount of franchise tax and penalties collected by him, if any.

Sec. 126. **Corporations Delinquent in Payment of Tax or Failing to File Report—Certifying to Attorney-General—Duty of Attorney-General—Certificate as Evidence—Payment of Fees or Filing of Report Before Institution of Suit.**—On or before the fifteenth day of November of each year the Secretary of State shall certify to the Attorney-General the names of all corporations that have neglected to pay the franchise taxes or have neglected to file the annual report in accordance with the provisions of this act, together with all facts in relation thereto, and it is hereby made the duty of the Attorney-General at the earliest practicable moment, in the name of the People of the State of Illinois, to institute proceedings for the dissolution of such corporation for failure to pay such fees, or for the abandonment and nonuser of charter. The certificate from the Secretary of State to the Attorney-General shall be taken and received in all courts and places as prima facie evidence of the facts therein stated. At any time prior to the institution of suit and upon filing an affidavit that the corporation has been continuously in active business and filing of a report in the form of an annual report required by this act, and upon the payment of all fees, taxes and penalties due, the Secretary of State shall certify to the

Attorney-General of the filing of the report and the payment of the fees, taxes and penalties due.

Sec. 128. **Payment of Franchise Tax and Fees as Condition to Doing Business or Maintaining Suits.**—No corporation required to pay a franchise tax or fee under the laws of this state shall transact any business in this state or maintain any action at law or suit in equity unless such corporation shall have paid such franchise tax, or such fees and penalties when the same become due and payable until such franchise taxes, fees and penalties have been paid in full.

Sec. 129. **Annual Franchise Taxes.**—In addition to all other fees required by law to be paid, the Secretary of State shall collect in advance from corporations subject to a franchise tax, annual franchise taxes as follows:

(1) If a corporation is organized, or admitted to do business in this state, or its capital stock issued or increased;

(a) Between July first of any year (after the year 1919) and September thirtieth of the same year a franchise tax equal to the full amount of the annual franchise tax;

(b) Between October first of any year (after the year 1919) and December thirty-first of the same year a franchise tax equal to three-fourths of the annual franchise tax;

(c) Between January first of any year and the last day of February of the same year, a franchise tax equal to one-half of the annual franchise tax;

(d) Between March first of any year and June thirtieth of the same year, a franchise tax equal to one and one-third of the annual franchise tax.

The franchise tax required by paragraphs "a," "b" and "c" shall be for authority of the corporation to carry on its corporate business until the thirtieth day of June following the date of payment of such tax. The franchise tax required by paragraph "d" of existing corporations increasing their capital stock shall be for authority of the corporation to employ its increased capitalization in this state until the thirtieth day of the second June following, but such corporation shall still be liable to pay its annual franchise tax upon its old capital stock in July following in the same manner as required of other corporations not increasing their capital stock. The fees required in this section shall be based upon the percentum of issued capital stock as evidenced by latest annual report required to be filed under the provisions of this act, if any.

The word "between," as used in this section, shall include both dates specified.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 130. ——**In Addition to Other Licenses or Taxes.** —The annual franchise taxes imposed by this act shall be in addition to any specific licenses or taxes imposed by law upon such corporation for the privilege of carrying on its business, or upon its franchise or property.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation,
Appellee.

No. 178.

Appeal from Statutory District Court of the United States for the Southern District of Illinois, Southern Division.

APPELLEE'S ADDITIONAL BRIEF AND ARGUMENT COVERING QUESTIONS OF FEDERAL AND EQUITY JURISDICTION.

J. R. TURNEY,
JOSIAH WHITNEL,
Counsel for Appellee.

CARTER, JONES & TURNEY,
H. L. BROWNING,
Of Counsel for Appellee.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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tion against which a tax is assessed, notifying such corporation of the amount of the franchise tax assessed against it for the year next ensuing, commencing on July first, and the amount found by the Secretary of State to be due upon an increase of capital stock of a foreign corporation represented in this state, and that objections, if any, to such assessment will be heard by the officer making such assessments, upon request by corporation on a day not later than the twenty-fifth day of June, provided upon proper showing to the Secretary of State that the failure to request a hearing before that date was due to the absence or sickness on the part of some officer of the corporation, the Secretary of State may grant a hearing after that date. Such notice shall further state that the tax herein assessed is payable to the officer making the assessment on July first after the date of the notice. The notice required by this section shall be mailed to the corporation addressed to its post-office address, as shown by the records in the office of the Secretary of State. A failure to receive the notice mentioned in this section shall not relieve a corporation of the obligation to pay the annual franchise taxes nor shall it invalidate the assessment of the tax.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 113. **Collection of Assessment.**—It shall be the duty of the officer making the assessment to collect the same.

Sec. 114. **Delinquent Corporations—Penalty.**—If the franchise tax assessed in accordance with the provisions of this act shall not be paid on or before the thirty-first day of July, it shall be deemed to be delinquent, and there

shall be added a penalty of five per cent for each month or part of month that the same is delinquent, commencing with the month of August.

Sec. 115. **Franchise Taxes and Penalties a Prior Lien—Record of Taxes, Penalties and Costs.**—The franchise taxes assessed under this act, together with penalties, interest and costs that shall accrue thereon, shall be a prior and first lien on the real and personal property of the corporation from and including the first day of July of the year when such franchise taxes should have been paid until the same have been paid.

The Secretary of State shall make and keep in his office a record showing the name of each corporation against which a franchise tax has been assessed, the amount assessed against each corporation, together with penalties and costs, if any, and the date when paid, and a notation of any and all proceedings taken for the collection of the franchise tax.

Sec. 116. **Collection of Delinquent Franchise Taxes and Penalties—Procedure.**—In case any corporation shall fail, refuse or neglect to pay the franchise tax assessed against it on or before the thirty-first day of July, the Secretary of State shall issue a warrant, under his hand and official seal, directed to the Sheriff of any county in the state, commanding him to collect and return such franchise tax and penalties. It shall be the duty of the Sheriff receiving such warrant to levy upon and sell the personal property of such corporation to satisfy such franchise tax and penalties, together with the legal costs and charges of such Sheriff. Upon the receipt of such warrant the Sheriff shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in

Equity jurisdiction is claimed because of threatened irreparable injuries to appellee's property rights, there being no adequate remedy at law (Rec., pp. 9, 11, 12).

After describing the tax sought to be imposed and the grounds by reason of which appellee's constitutional rights were infringed upon, it is averred in the bill of complaint:

> "That the predecessor in office of the defendant William J. Stratton, to wit, Louis L. Emmerson, as Secretary of State of the State of Illinois, did, **over the objection and protest** of the plaintiff, assess said franchise tax or license fee for the year July 1, 1927, to June 30, 1928, at the sum of $1,000.00; that, on being advised of said assessment, plaintiff notified said Secretary of State that it objected to the amount of said tax as fixed by him and requested a hearing in regard thereto, and that said Secretary of State neglected, failed and refused to fix a time and place for said hearing, and that plaintiff's agent called at the office of said Secretary of State and explained fully to his assistant in charge of the assessment of franchise taxes the contention of plaintiff, by virtue of which a franchise tax for the year July 1, 1927, to June 30, 1928, in an amount not exceeding $135.21, was due and that said assistant, on behalf of and with the authority of said Louis L. Emmerson, insisted that a franchise tax of $1,000.00 was due, and refused to change the amount of said tax as assessed, and informed plaintiff's agent of the purpose of said Secretary of State to insist upon the payment of the tax as so assessed, and in the event of nonpayment to enforce all of the penalties and for-

feitures provided by law in the event of the nonpayment of such franchise tax" (Rec., p. 8); and

"Plaintiff further shows that there is no method provided by the laws of the State of Illinois for an appeal from the assessment of said tax as aforesaid by the defendant and his predecessor in office, and that there is no provision in said law whereby the fixing of said tax as aforesaid may be reviewed by a court; that it is the duty of the defendant, on the failure of plaintiff or any foreign corporation to pay the franchise tax so assessed, to forfeit the right of such corporation to do business in the State of Illinois and to make illegal and unlawful under the laws of the State of Illinois any business, contract made by the plaintiff or such corporation in said state and to enforce divers penalties, including criminal prosecution, against the plaintiff, its officers or employes on the ground that it has failed to pay said tax, to comply with the General Corporation Act, and is unlawfully doing business in Illinois; that the agent of the Secretary of State in charge of the assessment of said taxes has informed plaintiff of the purpose of the defendant to collect said tax of $1,000.00 as so assessed, and on the nonpayment thereof it is the purpose of the defendant to enforce all of the forfeitures and penalties as provided by the laws of the State of Illinois" (Rec., pp. 9-10).

"Plaintiff further shows to the Court that, because of its failure and refusal to pay said franchise tax as assessed against it, said defendant **threatens, intends to and will take steps to revoke and terminate the authority of the plaintiff to do business in the State of Illinois** and institute proceedings to collect said tax and to enforce the penalties provided by said Gen-

eral Corporation Act against it, its officers and employes, and that, by reason of the duties and powers placed upon the defendant in and for the collection of said tax and in the enforcement of said penalties, the plaintiff is threatened with great and irreparable injury, for which it cannot be adequately compensated at law and has no adequate remedy at law.

"Plaintiff further shows unto the Court that it cannot obtain relief or protection elsewhere than from the Court through the exercise of a writ of injunction to restrain said unlawful acts on the part of the defendant.

"And, in order that the plaintiff, its officers, employes and property, may be protected against the unlawful and unjustifiable threatened acts and actions of the defendant, the plaintiff respectfully prays" (Rec., p. 12).

Diversity of citizenship is alleged, it being averred that the plaintiff St. Louis Southwestern Railway Company is a citizen and resident of the State of Missouri and that the defendant William J. Stratton, Secretary of State, is a citizen and resident of the State of Illinois (Rec., pp. 3-4).

It is further averred that:

"Plaintiff represents that this is a suit in equity, brought to restrain the enforcement, operation and execution of the statutes of the State of Illinois, known as the General Corporation Act of Illinois, and particularly sections 105, 107, 92 and 114 thereof,

which provide for the payment of a minimum franchise tax of $1,000 by plaintiff, based solely on plaintiff's total issued capital stock, on penalty of forfeiting plaintiff's authority to do business in the State of Illinois, and the suffering by plaintiff and plaintiff's employes by divers fines and penalties, by restraining an officer of said state, namely, the defendant William J. Stratton, Secretary of State of the State of Illinois, from, after the payment of a tax of $135.21 by plaintiff, enforcing the aforesaid provisions of the said statute, and foregoing provisions thereof, as sought to be applied to the plaintiff, are void and unconstitutional under the provisions of the Constitution of the United States of America heretofore mentioned; that this suit is brought to prevent the defendant, under color of the said Illinois statutes, from depriving it from privileges and immunities secured to it by the Constitution of the United States of America, and to prevent the defendant from depriving plaintiff under color of the aforesaid statutes of rights, privileges and immunities secured to the plaintiff by the Constitution of the United States of America; further, that this is a suit of a civil nature, being a bill in equity filed by the plaintiff, a citizen and resident of the State of Missouri, against the defendant, a citizen of the State of Illinois, to enjoin the defendant, his agents, attorneys and employes from enforcing or undertaking to enforce against the plaintiff certain penalties provided by the statute of the State of Illinois, account plaintiff's failure to pay the annual license fee or franchise tax heretofore referred to; **that there is involved in this controversy the right and authority of plaintiff to do business in the State**

of Illinois, the value of which right, exclusive of interest and costs, exceeds the sum of $3,000, and is of a worth to the plaintiff of the value of, to wit, $5,000; and in this, that the defendant seeks to enforce the plaintiff to pay a franchise tax in the sum of $1,000, together with an additional penalty of 5 per cent per month after August 1, 1927, which tax and penalties are made a first and prior lien upon the property of the plaintiff in the State of Illinois; that there is involved the right and authority of the plaintiff to do and transact business in the State of Illinois, which business and penalties would exceed the amount of $3,000; and that to revoke the authority of the plaintiff to do business in the State of Illinois would damage the plaintiff in the large sum of, to wit, $5,000 or more'' (Rec., pp. 10-11).

Prayer of Bill.

In addition to the prayer for summons and to restrain the assessment of franchise taxes for subsequent years, as well as for the year in question, on the scale of minimums provided for in Section 107 of the Corporation Act, the prayer of the bill of complaint is that:

"That an injunction issue herein, perpetually enjoining the defendant William J. Stratton as Secretary of State of the State of Illinois, his successors, employes, clerks, agents, attorneys, and all persons acting for or under his instructions, from in any manner whatsoever revoking or taking steps to revoke the certificate of authority of the plaintiff to do business within the State of Illinois, because or on account

of the refusal of plaintiff to pay the franchise tax of $1,000, as aforesaid, or any part thereof in excess of $135.21 assessed by him against the plaintiff.

"That an injunction issue herein, perpetually enjoining the said defendant William J. Stratton, as Secretary of State of the State of Illinois, his successors, employes, attorneys, agents and all persons acting for or under his **instruction, from hindering or forbidding the plaintiff to transact business in the State of Illinois, or from instituting any proceedings or filing any complaint, either at law or in equity, or in any manner taking any steps whatsoever to enforce any of the penalties, forfeitures or prohibitions against the plaintiff, its officers and employes, on account of the refusal of the plaintiff to pay said franchise tax of $1,000 aforesaid**, or any part thereof, in excess of $135.21, as assessed against it" (Rec., p. 13).

We deem the several statutory provisions to be pertinent.

"Sec. 92. **Revocation of Certificate of Authority to Do Business—Grounds.**—The certificate of authority of a foreign corporation, subject to the provisions of this act, may be revoked by the Secretary of State: * * *

"(6) Upon failure, neglect or refusal to file an annual report, as required by this act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the 31st day of July of the year in which such franchise tax becomes due and payable."

(See pages 41 and 42 of Appendix to Original Brief.)

The bill further avers, the Secretary of State threatened and, unless restrained, would revoke appellee's certificate of authority to do business in Illinois (Rec., p. 12).

By section 94 (Appendix, pages 42-43) unlicensed foreign corporations, doing business in Illinois, are denied permission to maintain any suit in the courts of the state and are made liable to a penalty of not more than $1,000.00.

By section 128 (Appendix, page 53) it is provided that:

> "Sec. 128. **Payment of Franchise Tax and Fees as Condition to Doing Business or Maintaining Suits.**— No corporation required to pay a franchise tax or fee under the laws of this state shall transact any business in this state or maintain any action at law or suit in equity unless such corporation shall have paid such franchise tax."

By section 116 (Appendix, pages 51-52) it is provided that the Secretary of State "**shall**" issue a warrant, directed to the Sheriff of any county, to be levied upon any personal property of the delinquent corporation, and that the property so levied upon be sold to satisfy the tax. The Sheriff is required to execute such warrant.

The decree recited:

> "and upon consideration of the verified bill of complaint and the affidavit of W. A. Conaway, in support thereof, and after hearing evidence, both in support

of and in opposition to said application" (Rec., p. 27) * * *

"It is ordered, adjudged and decreed * * * that the defendant, William J. Stratton, Secretary of State of the State of Illinois, * * * be enjoined pending further order herein, from forfeiting the right of plaintiff to transact business in the State of Illinois, or in any manner taking any steps whatsoever to enforce any of the penalties, forfeitures and prohibitions against the plaintiff" (Rec., p. 27) * * *

"It is further ordered, adjudged and decreed that the motion by the defendant to dismiss the bill of complaint be denied; and the defendant having elected to stand by his motion to dismiss the bill of complaint for want of equity, it is further ordered, adjudged and decreed that a permanent injunction be awarded the plaintiff as prayed for in said bill of complaint and as hereinbefore is set forth" (Rec., p. 28).

BRIEF OF ARGUMENT.

Jurisdiction—As to the "Amount Involved in the Suit."

In an injunction suit to protect a property right, in determining the amount involved in a suit, the value of the property, or right to be protected, or the extent of the injury to be prevented, the value of the "object" sought to be accomplished, is the amount involved.

Packard v. Banton, 264 U. S. 140, at 142, 44 Sup. Ct. R. 257, 68 L. ed. 596;
McNeill v. Southern R. R., 202 U. S. 543, 26 Sup. Ct. R. 722, 50 L. ed. 1142;
Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 51 L. ed. 821;
Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205, 52 L. ed. 171;
Glenwood Light Co. v. Mutual Light Co., 239 U. S. 121, 60 L. ed. 174, 36 Sup. Ct. 30;
First National Bank of Columbus v. Louisiana Highway Com., 264 U. S. 301, 68 L. ed. 701, 44 Sup. Ct. 340.

A suit to enjoin the collection of taxes on the ground of perpetual contract of exemption from taxation involves the amount essential to sustain federal jurisdiction, where the contract right exceeds the statutory amount, although the particular tax assessed and levied is less than that sum.

Berryman v. Board of Trustees, 222 U. S. 334, 56 L. ed. 225.

The action of appellant in acquiescing to the jurisdiction of the District Court strengthens the inference to be drawn from the facts of record to sustain federal jurisdiction.

City of Gainesville v. Brown-Crummer Investment Co. et al., 277 U. S. 54, 72 L. ed. 781.

Where the jurisdictional value is controverted as a matter of fact, then a liberal presumption will be indulged in favor of the plaintiff's evidence.

Wetmore v. Rymer, 18 Sup. Ct. 293, 169 U. S. 115, Op. 127, 42 L. ed. 682.

The sum claimed in the plaintiff's pleading as being the amount in controversy ordinarily controls and the suit should not be dismissed by a federal court, as not substantially involving an amount sufficient to give jurisdiction, unless the facts pleaded create a legal certainty of such conclusion, or it is not legally possible for such value to be involved.

Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, Op. 732, 6 Sup. Ct. 501;

Vance v. W. A. Vandercook Co., 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. 645;

Smithers v. Smith, 204 U. S. 632, 51 L. ed. 656, 27 Sup. Ct. 297;

Put-in-Bay Waterworks L. & R. Co. v. Ryan, 181 U. S. 409, Op. 430-431, 45 L. ed. 926, Op. 937;

Ludwig v. Western Union Tel. Co., 216 U. S. 146, 30 Sup. Ct. R. 280, 54 L. ed. 423 ..... 12, 28, 29
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois, Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation, Appellee.

No. 178.

Appeal from Statutory District Court of the United States for the Southern District of Illinois, Southern Division.

APPELLEE'S ADDITIONAL BRIEF AND ARGUMENT COVERING QUESTIONS OF FEDERAL AND EQUITY JURISDICTION.

MAY IT PLEASE THE COURT:

Federal jurisdiction is claimed because this is a suit of a civil nature in equity, the matter in controversy arising under the Constitution of the United States and exceeding the sum or value of three thousand ($3,000.00) dollars, and there also being a diversity of citizenship between the parties to the action (Rec., p. 4).

Blackburn v. Portland Gold Min. Co., 175 U. S. 571, Op. 574, 44 L. ed. 276, Op. 278;

Deputron v. Young, 134 U. S. 241, 33 L. ed. 923, Op. 929;

Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. 293.

Jurisdiction as a Court of Equity.

Plaintiff has no adequate remedy at law. There is no provision under Illinois law for a judicial review of the franchise tax assessments, or for a recovery after payment of the tax assessed, and hence no remedy at law for relief or protection from the penalties provided for failure to pay, or to keep Secretary of State from revoking license to do business in Illinois, or restraining the various other penalties and forfeitures provided by the Illinois law.

Air-Way Corp. v. Day, 266 U. S. 71, 71 Sup. Ct. R. 85, 89 L. Ed. 10, at 12;

Ohio Tax Cases, 232 U. S. 576, at 587, 34 Sup. Ct. R. 372, 59 L. Ed. 738, at 743;

Ludwig v. Western Union Tel. Co., 216 U. S. 146, 30 Sup. Ct. R. 280, 54 L. Ed. 423.

ARGUMENT.

Federal Jurisdiction—As Affected by the "Amount Involved in the Suit."

In this case, for the purpose of determining federal jurisdiction, the sum or value of the amount in controversy is not alone the difference ($864.79) between the tax demanded by the Secretary of State and the tax offered to be paid by appellee. The demand by the Secretary of State of payment of such disputed item (and his threatened actions if not paid) is the reason which prompted appellee to institute this suit. By reason of appellee's nonpayment of such amount the Secretary of State threatened to do, and would (unless restrained) have done, serious and irreparable injury to appellee's property rights. This suit was brought for the purpose of enjoining such threatened injuries. The rights sought to be protected and/or the amount of the damage which the threatened injuries would have done to appellee, the value of the real "object" sought to be obtained, is the sum or value involved in this suit.

The sum claimed in plaintiff's pleading as being the amount in controversy ordinarily controls and the suit will not be dismissed, on the pleadings, as not substantially involving an amount sufficient to give federal jurisdiction unless the facts pleaded create a legal certainty of such conclusion, or it is not legally possible for such a value to be involved.

"In Barry v. Edmunds, 116 U. S. 550, it was held that a suit cannot properly be dismissed by a Circuit Court of the United States as not involving a controversy within the jurisdiction of the Court unless the facts, when made to appear on the record, create a legal certainty of that conclusion."

Deputron v. Young, 134 U. S. 241, 33 L. Ed. 923, Op. 929;
See other cases cited in Brief.

We submit that no such certainty exists or conclusion can be drawn in this case, and that, on the contrary, this controversy clearly involves the jurisdictional amount in the following respects:

1. The Secretary of State threatened to and would (unless restrained) have revoked appellee's certificate of authority to do business in the State of Illinois (Rec., p. 12). The prayer of the bill seeks to restrain such threatened action (Rec., p. 13). The bill charges that the value to appellee of this authority exceeds the sum or value of $3,000.00, exclusive of interest and costs (Rec., p. 11). Appellee had paid admission fees on $5,500,000.00 of its capital stock, and, if revoked, to again secure the admission of that amount of its capital stock, it would be required to pay the State of Illinois at least $3,437.50, being an admission fee (1/20 or 1 per cent of $5,500,000.00) of $2,750.00, plus a franchise tax amounting to at least one-fourth of the admission fee, or $687.50. (See Sec. 129, Ill.

Stat., Appendix 53.) Appellee's right to do business would not expire until the year 1991 (sixty-four years), and it would until then retain this right without the payment of any additional admission fees (unless it brought additional property and business into the state). Even though appellee repurchased its right of admission into Illinois, it must in the succeeding year again submit to such unlawful demand or again suffer its permit to be forfeited. This process would be repeated for sixty-four years, unless appellee each year paid the unlawful tax. Surely the right to be free from such unlawful exactment is of a value exceeding $3,000.00. Furthermore, appellee's right or authority to do business in the State of Illinois had a value in excess of the cost of repurchasing the same. If revoked appellee could not lawfully transact any local business, which amounted to $2,868.30 in the preceding calendar year, nor maintain any action in the Illinois courts. If, after its certificate of authority had been revoked as threatened, appellee had transacted any local business in Illinois, it would have been subject to a fine of not exceeding $1,000.00.

If revoked, appellee's corporate name would be subject to appropriation by some other corporation.

All of the foregoing threatened results and damage may be properly inferred from the averments of the bill.

Furthermore, appellee's specific averment that to revoke its certificate of authority to do business in Illinois would damage it to the extent of "$5,000.00 or more"

(Rec., p. 11) would, if an issue of fact had been raised thereon (its truthfulness was admitted by the motion to dismiss), have permitted proof. Evidence of items of damage, not susceptible of direct inference from the bill, would have been competent (or, if necessary, the bill could have been amended).

Many situations which would result in great damage to appellee, if its authority to do business in Illinois be revoked, will readily occur to the Court. For example, such a happening might constitute breach (under the terms) of valuable leases or contracts held by appellee, or a default under mortgages given by appellee. Proof of such matters would have been proper if an issue of fact had been raised as to the amount of damage appellee would sustain by reason of its authority being revoked.

2. Appellee seeks to restrain the assessment of franchise taxes against it on the basis of the scale of minimums of section 107, not only for the year July 1, 1927, to June 30, 1928, but for all subsequent years (Rec., pp. 12-13). Such was one of the "objects" of the bill. There is involved approximately $864.79 annually for sixty-four years—that is, until appellee's certificate of authority expires in the year 1991. The sum involved is such sum as, when capitalized, will, for sixty-four years, produce annually such an amount. Manifestly, it will many times exceed $3,000.00.

3. Appellee seeks to enjoin the Secretary of State "from hindering or forbidding the plaintiff to transact business

in the State of Illinois, or from instituting any proceedings or filing any complaint, either at law or in equity, or in any manner taking any steps whatsoever to enforce any of the penalties, forfeitures or prohibitions against the plaintiff, its officers and employes" (Rec., p. 13). Among other things, the Illinois Statutes, Sec. 116 (Appendix, pp. 51-52), it is provided that the Secretary of State "**shall**" issue a warrant, directed to the Sheriff of any county, to be levied upon any personal property of the delinquent corporation, and that the property so levied upon be sold to satisfy the tax. The Sheriff is required to execute such warrant.

The record (p. 17) shows that appellee had $15,000.00 in stock and securities, and $786,196.00 in rolling stock, all of which is personal property, in Illinois, and which could be subjected to such a warrant.

We say that the amount involved in this suit is the aggregate sum of all the foregoing items of loss and damage.

The Statutory District Court disposed of this case on motions for an interlocutory injunction and to dismiss for want of equity only (Rec., p. 27). Appellant has never questioned federal jurisdiction. If he had questioned such jurisdiction, the facts on which it is based might have been repleaded and better phrased.

In considering the inferences to be drawn from the matters pleaded in the bill of complaint, the Court may fairly consider the fact that jurisdiction has not heretofore been questioned.

"Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time (citing cases). Yet the action of the party in acquiescing may strengthen inferences of necessary facts from the record to sustain the jurisdiction, in the absence of a showing to the contrary."

Gainesville v. Brown-Crummer Invest. Co., 277 U. S. 54, Op. 59, 72 L. Ed. 781, Op. 783-4.

In determining whether a jurisdictional amount is involved, the Court should liberally construe the matters pleaded. Even where the jurisdictional value is a controverted matter of fact, the evidence is liberally construed in order to support federal jurisdiction.

In the case of Wetmore v. Rymer, 18 Sup. Ct. 293, 169 U. S. 115, Op. 127, 42 L. ed. 682, the Court, considering the evidence offered in support of jurisdiction, after reciting that the plaintiff alone presented evidence on such matter, said:

"A liberal presumption ought, therefore, to be indulged in favor of the plaintiff's evidence in that regard" (Op. 127).

The averments of appellee's bill of complaint are entitled to a similar indulgence.

It is the well-settled rule that in an injunction suit to protect a property right the value of such right, or the

extent of the injury to be prevented and/or the value of the "object" sought to be accomplished is, in determining federal jurisdiction, the amount involved. There are many cases similar to this, i. e.:

The Southern Railroad Company billed McNeill for $146.00, account demurrage. In consequence to his refusal to pay the demurrage the railroad company refused to deliver cars on a private spur track, by means of which it had heretofore served him, and notified McNeill it would make deliveries only on the public team track.

McNeill made complaint to the North Carolina Corporation Commission, which entered an order requiring the railroad company, upon the payment of the freight charges, to make delivery of certain interstate cars on the private spur track heretofore mentioned. The railroad filed a bill in equity in the United States court to enjoin the enforcement of the order of the Commission and to enjoin actions to recover penalties or damages on account of the violation of such order. Federal jurisdiction was questioned. On appeal this Court said:

> "In the court below it would seem to have been claimed that the $146.00 demurrage was the question at issue. However this may be, as said by the trial court, although the demurrage dispute may have been the origin of the litigation, there is involved in the controversy presented by the bill, not only the right to enforce against the railway company the payment of statutory penalties much in excess of $2,000.00, but

also the right of that company to carry on interstate commerce in North Carolina without becoming subject to such orders and directions of the Corporation Commission, which so directly burdened such commerce as to amount to a regulation thereof. This latter right is alleged in the bill to be of the necessary jurisdictional value, the averment was supported by testimony, and the Master and the court below have found such to be the fact'' (Op. 558).

McNeill v. Southern R. Co., 202 U. S. 543, Op. 558, 50 L. ed. 1147.

There was a similar holding in the case of Packard v. Banton, 264 U. S. 140, Op. 142, 68 L. ed. 597, where the Court said:

''Appellees insist that the District Court was without jurisdiction because the matter in controversy does not exceed the value of $3,000.00 (Judicial Code, Sec. 24, Subd. 1). The bill discloses that the enforcement of the statute sought to be enjoined will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000.00, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week, and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be

gained that determines the amount in dispute" (citing cases) (Op. 142).

In this case the enforcement of the Illinois statute "will have the effect of materially increasing" appellee's expenditures account franchise taxes to the extent of $864.00 per year, as against $18.50 per week in the aforementioned case.

In the decided cases it is frequently stated that the jurisdictional amount is to be tested by the object to be "obtained" by the suit. The object to be obtained by this suit is to prevent the Secretary of State of Illinois from arbitrarily revoking applicant's authority to do business in the state and from inflicting divers penalties and forfeitures by reason of its failure during the year in question and during succeeding years to pay a tax which is unlawfully demanded. There can be no presumption that the Legislature will change the law. If the law remains the same, then one of the objects to be secured would be relief annually for a period of sixty-four years from a tax of approximately $850.00 per year.

The New York Cotton Exchange sued to enjoin one Clarence P. Hunt from receiving and using quotations of sales on such exchange until he had acquired the right from the Exchange or from one of the telegraph companies authorized to distribute such quotations. It was claimed there was no federal jurisdiction because the right to use such quotations could be acquired by purchase from the

telegraph companies for less than the jurisdictional amount. This Court upheld the plaintiff's contention that the amount involved was the value of the object sought to be accomplished by the bill, viz., to preserve the right of the Exchange to control the quotation, which right was averred to exceed the jurisdictional amount.

Hunt v. New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821.

The Glenwood Light & Water Company brought suit against the Mutual Light & Power Company in the federal court to restrain the defendant from maintaining its poles and wires on the same side of the street as that occupied by the complainant's poles and wires, and in such proximity as to injure or endanger the property of the complainant and its customers. Jurisdiction was questioned on the ground that the cost of removing the defendant's poles and wires (about $500.00) did not equal the jurisdictional amount. This Court held that the amount of the controversy was not simply the cost of removing the poles, but was the value to the complainant of the right to conduct its business free from the wrongful interference by the defendant company. This Court upheld jurisdiction, saying:

> "We are unable to discern any sufficient ground for taking this case out of the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, viz., that the jurisdictional

amount is to be tested by the value of the object to be gained by complainant. The object of the present suit is not only the abatement of the nuisance, but (under the prayer for general relief) the prevention of any recurrence of the like nuisance in the future."

Glenwood L. & W. Co. v. Mutual L. H. & P. Co., 239 U. S. 121, 60 L. Ed. 174, at 176.

In practically every decision involving the jurisdictional amount, in injunction suits, the Court refers to jurisdiction as being based on the object to be accomplished by the bill. Indeed, is not one of the objects of the bill here to prevent the Secretary of State of Illinois from annually hereafter applying an illegal scale of minimums, which, if paid, would annually result in an unlawful exaction from appellee. One of the objects of the bill is to force the Secretary of State to assess appellee's annual franchise tax on the basis of its capital stock, represented by property and business in Illinois.

In the Glenwood case the actual cost of removing the obstructing poles and wires would have been about $500.00. Jurisdiction was sustained because the plaintiff company sought to be relieved not only of that particular $500.00 obstruction, but from other obstructions which the defendant company might in the future put upon the streets—the value of such freedom being in excess of $2,000.00. Appellee here is striving to avoid not only the excess tax for the year 1927, but also the excess tax for all subsequent years and in its bill prays that the defendant be enjoined

"from hereafter at any time assessing any franchise tax against the plaintiff, based on the minimum scale fixed by section 107" (Rec., pp. 12-13).

In the case of Scott v. Donald, 165 U. S. 107, at 115, 41 L. Ed. 648, at 654, one James Donald brought a suit to enjoin the illegal seizure of liquors planned to be imported by him into the State of South Carolina. It was his purpose to, from time to time, import such liquors. The value of any individual importation at any one time would not equal the jurisdictional amount. However, the aggregate of such importations to be made from time to time and the value of the plaintiff of the right to make such importations exceeded the jurisdictional amount. It was held that the federal court had original jurisdiction. Is there any substantial difference between Donald's rights to import, free from the threat of illegal seizures from time to time made, and appellee's right to continue to transact business in Illinois, free from periodical illegal tax assessments on the basis of the scale of minimums of Section 107 of the Illinois Corporation Act?

In a suit by a railroad company to enjoin the scalping and resale of nontransferrable tickets—the value of the business sought to be protected was held to be the test, not the value of the tickets sold at any one time or from time to time.

Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205, 52 L. Ed. 171.

The board of trustees of Whitman College sued Berryman and other taxing officials to enjoin the collection of taxes amounting to $946.32 upon the property of Whitman College. The trustees contended there was a perpetual contract exempting the college property from taxation and sought to prevent the impairment of said contract by a decree recognizing such exemption and restraining present and future taxation. The object was to escape a tax bill of approximately $946.00, not only for the year in question, but for subsequent years. Clearly, such object, if attained, had a value of more than $3,000.00. Federal jurisdiction was upheld.

Berryman v. Board of Trustees of Whitman College, 222 U. S. 334, 56 L. Ed. 225.

There is no substantial difference between the Berryman case and this. Appellee claims the right to be free from the assessment of a franchise tax on the scale of minimums of section 107. As long as the due-process, commerce and equal-protection provisions remain in the Federal Constitution appellee is entitled to such right, and, if its contention is correct on the merits, then never can appellant assess franchise taxes against it on the basis objected to.

There is involved approximately $860.00 per year for sixty-four years, as well as the value of appellee's authority to do business in Illinois, and as well as the damage

which appellee would suffer if its right to do business in Illinois should be revoked.

To be worth $3,000.00, appellee's local business need not return over $180.00 net annually. Can the Court say that it is not legally possible for appellee's local annual business of, say, $2,800.00, to net $180.00 or more?

Nothing could be more certain than that, unless appellee secures injunctive relief, it will, every year, be faced with the same illegal tax.

It is the object of the bill to restrain the defendant from revoking appellee's authority to do business in Illinois; from enforcing divers penalties and forfeitures, and from at any time thereafter assessing a franchise tax against appellee on the basis of an illegal sale of minimums. Manifestly, the value of such objects exceeds $3,000.00.

Jurisdiction as a Court of Equity.

There is no method provided by the law of Illinois whereby appellee's franchise tax, as assessed by the Secretary of State, could be reviewed. The authority of the Secretary of State, in such respect, is arbitrary. So is the authority conferred upon the Secretary of State by the Illinois statute to revoke appellee's certificate of authority to do business in Illinois.

It is pleaded in the bill that there is no method provided by the laws of Illinois for an appeal from the assessment of the tax or for the review of its legality (Rec.,

pp. 9 and 10), and that if the tax was not paid in the amount assessed, that appellant "threatens, intends to and will take steps to revoke and terminate the authority of plaintiff to do business in the State of Illinois, and institute proceedings to collect said tax, and to enforce penalties provided by the General Corporation Act against it * * *, the plaintiff is threatened with great and irreparable injury for which it cannot be adequately compensated, and has no adequate remedy at law" (Rec., p. 12).

Under such circumstances, we do not know of any relief which appellee had at law. It must have either submitted to and paid the unlawful tax or else appealed to a court of equity to enjoin the threatened injury.

If the Secretary of State had not been restrained and if he had revoked appellee's authority to do business in Illinois and enforce the divers penalties and forfeitures provided by law, the injury to appellee would have been irreparable. The State of Illinois cannot be sued, and the Secretary of State would not be personally liable. Even though he were personally liable, a remedy by suit against the Secretary of State would not be an adequate remedy.

In the case of Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71, Op. 79, 69 L. ed. 169, Op. 175, equity jurisdiction was invoked and sustained in a case similar to this, on the ground that the plaintiff was threatened with irreparable injury through the enforcement of the

coercive provisions of an Ohio statute, which statute is practically the same as the Illinois statute here involved.

Where the bill alleges threatened irreparable injury, through the enforcement of penalties, and coercive features of a statute, sufficient ground for equity jurisdiction is laid.

> Ohio River & W. R. Co. v. Eitty, 232 U. S. 576, Op. 587, 58 L. ed. 737, Op. 743.

The Secretary of State of Arkansas threatened to issue a proclamation in his official capacity under authority of a state statute forbidding the Western Union Telegraph Company (under the heavy penalty prescribed by the statute) to continue to do a local business in the State of Arkansas. The Telegraph Company sought to restrain such action and to restrain the revocation of its authority to do business in the State of Arkansas. Equity jurisdiction was questioned and this Court held grounds for equitable relief to exist. The penalties threatened were very similar to the penalties threatened against appellee in this case.

The Court said:

> "In order to prevent the contemplated or threatened injury to the company, the court below properly made a decree perpetually enjoining the appellant, as Secretary of State, his agents and attorneys, from

making proclamation that the Telegraph Company has no authority to continue doing business in Arkansas" (Op. 164).

Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 54 L. ed. 423.

We respectfully submit that there is federal and equity jurisdiction of this cause.

Respectfully submitted,

J. R. TURNEY,
JOSIAH WHITNEL,
Attorneys for Appellee.

CARTER, JONES & TURNEY,
H. L. BROWNING,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation,
Appellee.

No. 178.

Appeal from Statutory District Court of the United States for the Southern District of Illinois, Southern Division.

APPELLEE'S MEMORANDA OF AUTHORITY ON EQUITY JURISDICTION.

J. R. TURNEY,
JOSIAH WHITNEL,
Counsel for Appellee.

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H. L. BROWNING,
Of Counsel for Appellee.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois, Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation, Appellee.

No. 178.

Appeal from Statutory District Court of the United States for the Southern District of Illinois, Southern Division.

APPELLEE'S MEMORANDA OF AUTHORITY ON EQUITY JURISDICTION.

Recovery of Taxes Paid Under Duress.

Where a person, not lawfully liable to pay a tax, is peremptorily called on to pay, under threat of immediate execution of a warrant, and he can save himself or his property in no other way; then by paying the illegal demand, giving notice that he pays it under protest, such payment will be considered under duress and he may thereafter

maintain an action in assumpsit against the taxing body (the State excepted) to recover the tax so paid.

Harvey & Boyd v. President & Board of Trustees of Town of Olney, 42 Ill. 336;
Conkling v. City of Springfield, 132 Ill. 420;
Bradford v. City of Chicago, 25 Ill. 349;
Falls v. City of Cairo, 58 Ill. 403.

To render a payment compulsory, such pressure must be brought to bear upon the person paying as to interfere with his free enjoyment of his rights of person or property—the compulsion must furnish the motive for the payment sought to be avoided.

School of Domestic Arts v. Harding, 331 Ill. 330, Op. 332;
Illinois Glass Co. v. Chicago Telephone Co., 234 Ill. 535;
Yates v. Royal Insurance Co., 200 Ill. 202;
Stover v. Mitchell, 45 Ill. 213;
Elston v. City of Chicago, 40 Ill. 514.

Tax money voluntarily paid under an unconstitutional state statute cannot be recovered; and in this connection fear and belief that unless such payment is made the payor will be subjected to the penalties provided by the unconstitutional statute does not amount to duress.

Richardson Lubricating Co. v. Kenney, 337 Ill. 123.

A payment made to prevent a sale of real estate for an illegal tax is not under compulsion, but must be regarded as voluntary.

Otis v. People ex rel. County Treasurer, 196 Ill. 542, at 547;
Stover v. Mitchell, 45 Ill. 213.

Where an officer of the taxing municipality still has in his possession the tax money so collected by compulsion, then the taxpayer may maintain a suit against such officer in his official capacity to recover.

Yates, Insurance Supt., v. Royal Ins. Co., 200 Ill. 202;
Swanston v. Ijams, County Treasurer, 63 Ill. 165.

Where an illegal tax is paid under protest, but without compulsion or duress, such payment is voluntary and the tax cannot be recovered.

School of Domestic Arts v. Harding, 331 Ill. 330, Op. 332;
Davis v. Board of Education, 323 Ill. 281;
Conkling v. City of Springfield, 132 Ill. 420.

We find no Illinois authority holding that where an illegal state tax is paid under duress (not involving a trespass), with protest, and thereafter the state officer receiving the same pays the money into the state treasury (the money could be recovered from any other taxing

body), that then such officer becomes personally liable for the tax.

> "A county which has collected general taxes for itself and the state, cities, towns, villages, school districts and the like, is not liable for those taxes which it has paid over to the public corporations or authorities which levied them (Commonwealth of Kentucky to use of Devoe v. Boske, 99 S. W. [Ky.] 316; Price v. Lancaster County, 18 Neb. 199; Meacham v. Town of Newport, 70 Vt. 264)."
>
> Hettler Lumber Co. v. Cook County, 336 Ill. 645, Op. 650.

The Statute.

There is no Illinois statute giving appellee, after payment of the tax under protest and/or under duress, the right, as a matter of law, to an injunction to restrain the Secretary of State from paying the money into the state treasury until the legality of the tax has been determined.

Section 2a of "An act in relation to the payment of the public money of the state into the state treasury," in force July 13, 1921 (Laws 1921, p. 586), follows:

> "Sec. 2a. It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this act by section 1 hereof to hold for thirty days all moneys received for or on behalf of the state under protest and on the expiration of such period to deposit the same

with the State Treasurer unless the party making such payment shall, within such period, file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the Court."

Smith-Hurd Rev. Stat., Chap. 127, Par. 172;
Cahill's Ill. Stat., Chap. 127 B, Par. 35.

The action of the Secretary of State in so paying the money into the state treasury would be an official ministerial act performed specifically in his line of duty, exactly as prescribed by the mandate of the statute, for violation of which he would be subject to a fine of not more than $1,000 and imprisonment for not more than two years, or both.

See Sec. 2B of Statute;
Smith-Hurd's Stat., Ch. 127, Par. 173;
Cahill's Stat., Ch. 127 B, Par. 36.

Public officers are not to be held personally liable for damages resulting from ministerial official acts performed by them in line of their specific duties, in exact accordance with the requirements of a statute.

Spalding v. Vilas, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631;
Conner v. Long, 104 U. S. 228, 26 L. ed. 723.

We find no holding by Illinois courts that the foregoing statute entitles taxpayers paying under protest to tempo-

rary injunction as a matter of right, or that application for such injunction is the exclusive remedy.

We understand that in practice the Attorney-General has always assented to the issuance of temporary injunctions in such cases, and the Circuit Court of Sangamon County has always heretofore acquiesced therein. If the procedure suggested by the statute is the sole remedy, then should the Attorney-General change his disposition and contest applications for temporary injunction, or if the Court, on its own motion, should refuse to allow such application, then, after the moneys were paid into the state treasury and commingled with the state funds, the taxpayer would be without any possible remedy.

Notwithstanding the fact that an unconstitutional statute confers no right, imposes no duty and affords no protection (Highway Commissioners v. City of Bloomington, 253 Ill. 164, Op. 176), still if appellee had paid the tax under protest and duress (there being no actual trespass) and had been unable to secure an injunction restraining payment into the state treasury; and if thereafter, at the expiration of thirty days appellant complied with the foregoing statute, then appellee would be without remedy at law or in equity, either against the State of Illinois or the Secretary of State. Surely, appellee should not be required to refuse to pay the tax, and if the victim of trespass on the part of the Secretary of State in the performance of his duty under the Illinois Corporation Act, then to sue the Secretary of State at law for the damages

sustained. Equity should take jurisdiction to enjoin the threatened application of the coercive provisions of the Illinois statute, as it did in the Air-Way, Cudahy Packing, Ohio Tax, Ludwig, and other cases.

The Supreme Court of the United States has upheld an injunction restraining the collection of Illinois taxes in a suit brought in the United States District Court. The adequacy of plaintiff's remedy at law is discussed in the opinion.

Raymond v. Chicago Union Traction Co., 207 U. S. 20, Op. 39-40.

"A court of equity will exercise jurisdiction to enjoin the collection of a tax where the tax is not authorized by law, where it is assessed upon property not subject to taxation and where the property has been fraudulently assessed at too high a rate. This is the long-established and well-recognized practice in this court."

The People's Gas Light Co. v. Stuckhart, 286 Ill. 164, Op. 176;

Illinois Central R. Co. v. Hodges, 113 Ill. 323, Op. 325;

Kimball v. Merchants' S. L. & T. Co., 89 Ill. 611, Op. 613;

Town of Lebanon v. Ohio & Miss. R. Co., 77 Ill. 539;

Porter v. Rockford, Rock Island & St. Louis R. R. Co., 76 Ill. 561;

Chicago, Burlington & Quincy R. R. Co. v. Cole, 75 Ill. 591;

Pacific Hotel Co. v. Lieb, 83 Ill. 602;

New Haven Clock Co. v. Kochersperger, 175 Ill. 383;
Calumet & Chicago Canal & Dock Co. v. Stuckhart, 275 Ill. 253.

Respectfully submitted,

J. R. TURNEY,
JOSIAH WHITNEL,
Attorneys for Appellee.

CARTER, JONES & TURNEY,
H. L. BROWNING,
Of Counsel for Appellee.

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No. 178.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois, Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois.

PETITION FOR REHEARING.

J. R. TURNEY,
JOSIAH WHITNEL,
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No. 178.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

WILLIAM J. STRATTON, as Secretary of State of the State of Illinois, Appellant, vs. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellee.	Appeal from the District Court of the United States for the Southern District of Illinois.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Appellee respectfully petitions for a rehearing herein and as grounds therefor suggests that the Court has overlooked matters which render inadequate the remedy at law outlined in the Court's opinion.

Assuming appellee had paid the contested tax to the Secretary of State of Illinois, under duress and with protest, there is no statute or rule of law in Illinois which

would have entitled appellee, as a matter of right, to an injunction restraining the Secretary of State from paying such tax over to the Treasurer, until after final decree on the merits.

We respectfully contend that the statute quoted in the Court's opinion cannot be construed as conferring any right of injunctive relief on objecting taxpayers. Its sole effect is to require tax collecting officers to pay the moneys paid under protest to the Treasurer within a specified time—excepting only if such taxpayer secures an injunction. For the Court's convenience we again quote the statute:

> "It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this act by section 1 hereof, to hold for thirty days all moneys received for or on behalf of the state under protest and on the expiration of such period to deposit the same with the State Treasurer, unless the party making such payment shall, within such period, file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the Court."

Whether the objecting taxpayer secures a temporary injunction will depend on whether or not the Illinois Court determines his bill of complaint to state cause for such relief. If the Court should be convinced that the tax

was lawfully collected, there is no reason why it might not properly refuse a temporary injunction. We find no Illinois case which holds the taxpayer to be entitled to a temporary injunction as a matter of right, or that the application for such an injunction is the exclusive remedy.

Once the tax money, even though paid under protest and duress, is turned into the State Treasury, it is lost beyond recall, for the State of Illinois cannot be sued.

Section 2B of the statute referred to in the Court's opinion makes a felon of the Secretary of State if, without being enjoined, he fails to pay over to the State Treasurer within thirty days any moneys collected under protest. (See Smith-Hurd's 1931 Revised Illinois Statutes, Chap. 127, Par. 172, § 2(b), cited on page 5, "Appellee Memoranda of Authority on Equity Jurisdiction," filed with permission of the Court after reargument.)

If appellee had paid the tax under protest, and had been unable to secure a temporary injunction, then it could not hold the Secretary of State personally liable, as his act in receiving and paying the money over to the Treasurer is an administrative one performed specifically as required by the statute referred to in the Court's opinion. (See cases cited on page 5 of Appellee's Memoranda.)

In practice, the Attorney-General has always assented to the issuance of temporary injunctions in such cases, and the Circuit Court of Sangamon County, Illinois, has always heretofore acquiesced therein. If the procedure suggested by the statute is the sole remedy, then, should

the Attorney-General change his disposition and contest applications for temporary injunction, or if the Court, on its own motion, should refuse to allow such application, then, after the moneys were paid into the state treasury and commingled with the state funds, the taxpayer would be without any possible remedy.

Suits against the collecting officers have been maintained only where such officer has, at the time, possession of the contested tax money. (See, again, the cases of Yates v. Royal Ins. Co. and School of Domestic Arts v. Harding, cited in the Court's Opinion.)

The situation is, without doubt, this:

1. Appellee could not pay the tax and recover in a suit against the State of Illinois.

2. Appellee could not recover a personal judgment against the Secretary of State if he, after payment under protest and without being enjoined, paid the tax money into the state treasury.

3. Appellant is not entitled, as a matter of right, to an injunction restraining appellee from paying the tax money into the treasury until the merits of the case have been determined. The Circuit Court of Sangamon County could, if satisfied the tax was legal, refuse to issue a temporary injunction. The Supreme Court of Illinois could refuse a supersedeas.

4. Appellee would then have no remedy, even though the tax be illegal.

By reason thereof we earnestly contend any legal remedy is inadequate, and under the principle referred to and authorities cited in the last paragraph of the Court's opinion appellee is entitled to equitable relief.

Respectfully submitted,

J. R. TURNEY,
JOSIAH WHITNEL,
Counsel for Petitioner.

CARTER, JONES & TURNEY,
H. L. BROWNING,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Josiah Whitnel

SUPREME COURT OF THE UNITED STATES.

No. 178.—October Term, 1931.

William J. Stratton, as Secretary of State of the State of Illinois, Appellant, *vs.* St. Louis Southwestern Railway Company.	Appeal from the District Court of the United States for the Southern District of Illinois.

[February 15, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal, Jud. Code §§ 238, 266, from a final decree of a District Court of three judges for the Southern District of Illinois, enjoining the assessment and collection from appellee of the minimum annual corporation franchise tax of $1,000, under §§ 105, 107, 112, 114, of the Illinois Corporation Act, as an unconstitutional burden on interstate commerce, and as violating the due process clause of the Fourteenth Amendment. — F. (2d) —. After argument here on the merits, the cause was again argued by direction of the Court, argument being limited to the question of the jurisdiction of the district court, both with respect to the amount involved in the suit and its jurisdiction as a court of equity.

The bill sets up as ground for equitable relief the threat of revocation of appellee's certificate of authority to do business within the state for failure to pay the tax, pursuant to §§ 92 and 94 of the Act, and the consequent irreparable injury to its business. The equity jurisdiction of the district court was challenged by appellant's motion below to dismiss the bill of complaint, and by the assignments of error here, and the question presented, like that in No. 84, *Matthews* v. *Rodgers*, decided this day, is whether, under state laws, the appellee is afforded such an adequate remedy, by payment of the tax and the maintenance of a suit at law to recover it, as to preclude resort to the preventive jurisdiction of equity.

By the laws of Illinois, as appellant argues, a tax paid under duress and protest that it is illegally exacted, may be recovered at law in an action of assumpsit, brought either against the taxing body, the state excepted, see *Harvey & Boyd* v. *Olney,* 42 Ill. 336; or against the collecting officer, see *Yates* v. *Royal Insurance Co.,* 200 Ill. 202; *School of Domestic Arts and Sciences* v. *Harding,* 331 Ill. 330. See also *German Alliance Insurance Co.* v. *Van Cleave,* 191 Ill. 410, 413-414, and *Hawkins* v. *Lake County,* 303 Ill. 624, 629, in each of which the court entertained bills by numerous taxpayers to enjoin the collection of taxes or to compel their refund, on the express ground that to do so would avoid a multiplicity of suits at law.

Recovery of the tax may not be had even though illegally exacted, unless its payment is procured by duress. See *Richardson Lubricating Co.* v. *Kinney,* 337 Ill. 122. But where the payment is of a corporate franchise tax like the present, made to avoid forfeiture of the franchise, which would result from non-payment, there is such duress as entitles the taxpayer to recover. *O'Gara Coal Co.* v. *Emmerson,* 326 Ill. 18, 21; *Western Cartridge Co.* v. *Emmerson,* 335 Ill. 150; see *Chicago & Eastern Illinois Ry. Co.* v. *Miller,* 309 Ill. 257.

By the Illinois statute, applicable to the present tax, Smith-Hurd's 1931 Revised Illinois Statutes, c. 127, par. 172, § 2 (a), it is provided that:

"It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this Act by section 1 hereof to hold for thirty days all moneys received for or on behalf of the State under protest and on the expiration of such period to deposit the same with the State Treasurer unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the Court."

This statute, for reasons stated at length in *Matthews* v. *Rodgers, supra,* can neither enlarge nor diminish the equity jurisdiction of the federal courts. It does not purport to confer any new remedy for the recovery of the tax. Nor does it impair the existing legal remedy, but supplements it by providing a method under the local procedure for staying payment over of the tax

money, so that it may be available for the satisfaction of any judgment obtained against the collector. See *Interstate Iron & Steel Co.* v. *Stratton*, 340 Ill. 422; *O'Gara Coal Co.* v. *Emmerson*, *supra*; *Hump Hairpin Mfg. Co.* v. *Emmerson*, 293 Ill. 387, 258 U. S. 290.

These cases recognize the continued existence in Illinois of the right to recover the tax. The fact that in them the suits brought were denominated "equitable", although the only relief of an equitable nature, sought or allowed, was the injunction against payment over of the tax, which was but incidental to the recovery of the money, cannot alter the character of the right as one enforcible at law. In determining what is a legal remedy and its adequacy to defeat their equity jurisdiction, the federal courts are guided by the historic distinction between law and equity in those courts, not by the name given to remedies or to distinctions made between them by the state practice. *Scott* v. *Neely*, 140 U. S. 106, 110-111; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 379. By this test the remedy by suit to recover a tax which has been paid is essentially a legal remedy, and it is not any the less so nor any the less adequate because the state practice has annexed to it an equitable remedy.

There being a legal remedy for the recovery of the tax, no case is made for invoking the jurisdiction of equity to enjoin collection of it in the absence of allegations setting up special circumstances which would render the legal remedy inadequate. See *Matthews* v. *Rodgers*, *supra*; *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269; *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor*, 223 U. S. 280; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.